No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the enforcement of an otherwise valid state statute that prohibits electioneering within 100 feet of a polling place violate the free speech clause of the First Amendment in the absence of distance markers defining the boundaries of the no electioneering zone even if the person against whom the statute is enforced: (a) admittedly received actual notice of the prohibition on electioneering, and (b) knowingly and deliberately violated it after receiving such notice?

2. Does the "bad faith" exception to the Abstention Doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971), permit a federal district court to enjoin a pending state administrative proceeding, initiated to determine the validity of disciplinary charges against a public employee, based on nothing more than: (a) the existence of two previous disciplinary proceedings against the employee both of which resulted in the imposition of disciplinary penalties by a state administrative panel, and (b) the "chilling effect" on the conduct that is the subject of the disciplinary charges?

LIST OF PARTIES

The petitioners are The Tuxedo Union Free School District (the "District"), a public school district located in the County of Orange, State of New York; Herbert Fliegner, Superintendent of the District; Keld Alstrup, now President of the Board of Education of the District (the "Board"); and Bernard Modder, Constance Jones Phelps, Robert Quinn, Joseph Ribando and Michael Santoianni, members of the Board. Neither the District nor the Board has any parent company or subsidiary.

Respondent Brian Cullen is a tenured high school teacher employed by the District.

The parties to the proceeding before the U.S. Court of Appeals for the Second Circuit were the same.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Second Circuit entered on February 28, 1994.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Second Circuit, reported at 18 F.3d 96, are reprinted as Appendix A hereto. They affirm a judgment of the U.S. District Court for the Southern District of New York, which is not reported; the judgment of the district court, the stipulated statement of facts so ordered by the district court and the transcript of its findings of fact and conclusions of law are reprinted as Appendix B hereto.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Second Circuit was entered on February 28, 1994. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves an unseemly intervention by a federal district court to enjoin a pending state administrative proceeding initiated to determine whether disciplinary charges by a school district against a tenured teacher for insubordination are valid and, if so, what penalty should be imposed. The intervention was approved by a panel majority of the U.S. Court of Appeals for the Second Circuit—over a dissent by Judge Amalya L. Kearse—based on a novel First Amendment theory that not only conflicts with the applicable decisions of this Court but also calls into question the constitutionality of election laws in dozens of states.

Equally important, the decision below is a dramatic departure from the principles of federalism and comity articulated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. If allowed to stand, it will engender widespread doubt and

uncertainty regarding the scope and force of the Abstention Doctrine—especially as it applies to state disciplinary proceedings.

The State Statutory Context

1. The State Tenure Statute: The New York legislature has enacted a comprehensive system that provides substantial job security for tenured teachers. N.Y. Educ. Law §§ 3012 *et seq.* (McKinney 1981). An integral part of the state statutory scheme is Section 3020-a, which provides a vehicle for disciplinary proceedings against tenured teachers upon a finding of probable cause by the Board of Education.[1]

A tenured teacher may be disciplined only after a full due process hearing (if requested) and only on the specific grounds set forth in the Education Law. *Id.* § 3012(2). Proceedings under Section 3020-a are decided by impartial three-member panels. The school district and the teacher each choose one member from a list of panelists established by the Commissioner of Education. Those panelists agree upon a third panel member who is selected from a list supplied by the American Arbitration Association and who serves as chair of the panel. *Id.* § 3020-a(3)(c).

The hearing before the panel must be conducted in accordance with the law and the regulations of the Commissioner. (*See* N.Y. Comp. Codes R. & Regs. tit. 8A, Part 82 (1991).) The teacher has the right to an attorney, to issue subpoenas and to call witnesses N.Y. Educ. Law § 3020-a(3)(c). If the charges are sustained, the panel decides on the appropriate penalty to be imposed—which must be selected from those enumerated in the statute. *Id.* § 3020-a(4). If they are not sustained, the teacher must be restored to his/her position and the charges removed from the teacher's personnel record. The panel's determinations on the charges and the penalty are binding on the school district. *Id.*

---

[1] Section 3020-a has been recognized by the New York Court of Appeals as "a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice." *Abramovich v. Board of Educ.*, 386 N.E.2d 1077, 1079 (N.Y. 1979); *see also Holt v. Board of Educ.*, 422 N.E.2d 499, 502 (N.Y. 1981).

A teacher (or the school district) may seek review of the panel decision and/or the penalty by appeal to the Commissioner of Education under Section 310 of the Education Law or to the courts under Article 78 of the New York Civil Practice Law and Rules ("CPLR"). *Id.* § 3020-a(5). Under the Education Law, the Commissioner may substitute his judgment for that of the panel.[2] The decision of the Commissioner on appeal is subject to review by the New York State courts. CPLR §§ 7801-7806 (McKinney 1981).[3] A teacher may be suspended by the school district pending resolution of the charges. N.Y. Educ. Law § 3020-a(2) (McKinney 1981). Absent special circumstances, however, the school district must continue to provide full pay and benefits during the suspension.[4]

2. The State Electioneering Statute: As early as 1888, in order to prevent voter intimidation and election fraud, New York law "prohibited any person from 'electioneering on election day within any polling-place, or within one hundred feet of any polling place.'" *Burson v. Freeman*, 112 S. Ct. 1846, 1854 (1992). Essentially the same prohibition remains in place today. N.Y. Elec. Law § 8-104 (McKinney 1978 & Supp. 1994). Section 2031-a of the Education Law specifically addresses school board elections.[5]

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[2] *Shurgin v. Ambach*, 436 N.E.2d 1324 (N.Y. 1982); *Kloepfer v. Commissioner of Educ.*, 82 A.D.2d 974 (3d Dep't 1981), *aff'd without op.*, 436 N.E.2d 1334 (N.Y. 1982).

[3] It is well settled that an Article 78 proceeding provides an adequate avenue for judicial review of constitutional issues raised in or by administrative proceedings. *See, e.g., University Club v. City of New York*, 842 F.2d 37, 40-41 (2d Cir. 1988); *Christ the King Regional High Sch. v. Culvert*, 815 F.2d 219, 224-25 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987); *see also Puentes v. Board of Educ.*, 250 N.E.2d 232, 233 (N.Y. 1969); *Clayton v. Board of Educ.*, 49 A.D.2d 343, 349-50 (3d Dep't 1975).

[4] *Jerry v. Board of Educ.*, 324 N.E.2d 106 (N.Y. 1974).

[5] It reads in pertinent part:

> § 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers.
>
> 1. At every election held for the office of trustee or member of a board of education . . . there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet

(continued...)

Section 2031-a—the construction of which divided the court below—has not been interpreted by the New York State courts.

The Controlling Facts[6]

The Tuxedo Union Free School District (the "District") is located in the County of Orange, State of New York. Dr. Herbert Fliegner is the Superintendent of the District. Brian Cullen ("Cullen") is a tenured high school teacher of science who has been employed by the District for 18 years.

We turn first to the past "charges and hearings" on which the courts below relied in concluding that the disciplinary proceeding at issue was brought "in bad faith."

1. The Past Disciplinary Proceedings: On February 15, 1990, the District filed charges against Cullen pursuant to Education Law § 3020-a alleging: (i) that during a weekend—in violation of previous directives—Cullen took students on an unauthorized trip in an aircraft; and (ii) that he encouraged students to expose themselves in one of his classes. After a hearing at which Cullen was represented by counsel, the three-member panel found Cullen guilty of the first charge and fined him $1,250.[7] It stated: "This

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[5](...continued)

from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections . . . *while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election.*

N.Y. Educ. Law § 2031-a (McKinney 1988) (emphasis added).

[6] These facts are largely drawn from the Stipulated Statement of Facts by Counsel, which was adopted by the district court and is included in Appendix B hereto. The pages of the Appendices hereto are referred to as "___a."

[7] The second charge was dismissed. The panel emphasized that, although students claimed that Cullen talked about "mooning" in his classroom, he responded appropriately to the "mooning" incident by, *inter alia*, reporting it to the Dean of Students. (93a)

violation of established policy, which [Cullen] well knew . . . is serious. He did put the lives of four students at risk and subjected the District as well as himself . . . to a tremendous liability." (93a) Explaining why they decided not to impose a higher fine, the panel described Cullen as a "very fine teacher" and opined: "we believe that he has learned his lesson from this unfortunate incident." (94a) Cullen did not appeal the decision on the charge or the fine.

On February 13, 1992, the District again filed Section 3020-a charges against Cullen, alleging: (i) that he ignited an aerosol spray in the presence of elementary school students while he was serving as a lunchtime supervisor; and (ii) that such conduct amounted to insubordination in that Cullen had received a prior directive not to engage in such conduct. After a hearing at which Cullen was represented by counsel, the three-member panel found Cullen guilty of both charges and imposed a disciplinary suspension of four months without pay.[8] Explaining the rationale for the penalty it imposed, the panel observed: "Unfortunately, [the prior] fine did not have its desired effect. . . . Aside from exercising poor judgment in performing the experiment in the first instance, [Cullen] reaffirmed the perception that he feels free to disregard certain directives of the District." (111a)

The District appealed to the Commissioner of Education. On May 5, 1994, he ruled that the penalty recommended by the panel was "too lenient" (124a) and instead imposed a one-year suspension without pay (125a). The Commissioner reasoned:

> [Cullen's] conduct . . . , coupled with his prior action of taking students on an unauthorized airplane ride, indicates a pattern of irresponsible conduct with students.
>
> Moreover, . . . both involve actions taken by [Cullen] after he had been specifically directed by district supervisors not to take such actions. The record of this appeal, therefore, also indicates a pattern of insubordination by [Cullen]. (124a)

---

[8] The decision on the charges (98a-109a) was dated July 21, 1992 and announced on or about September 1, 1992 (31a-32a). The penalty determination was made on October 26, 1992. (110a-116a)

2. The Events That Gave Rise to the Disciplinary Proceeding at Issue: On May 6, 1992, an election of candidates for the Board of Education of the District (the "School Board") was held at the District High School.[9] It was governed by Section 2031-a of the Education Law, which prohibits electioneering within 100 feet of the entrance to the polling place. (*See* note 5, *supra*.)

At about 3:30 p.m., after his workday, Cullen went to the front steps of the High School (about 41 feet from the entrance) and began handing out fliers protesting the election.[10] After a member of the District staff advised Superintendent Fliegner that Cullen was distributing fliers on the steps of the High School, the Superintendent approached Cullen. At the time, Cullen was distributing fliers at or about the bottom of the High School steps. Superintendent Fliegner directed him to move from the steps, explaining that, under the election law, he must be at least 100 feet away from the entrance of the High School if he wanted to electioneer. (34a) Cullen responded that the Superintendent could not tell him to do anything after school hours and that he would not move unless instructed by the police to do so. The Superintendent repeated his direction and Cullen again refused. (34a) The Superintendent then called the Tuxedo Police, requesting a unit to instruct Cullen to move to an appropriate distance from the polling place.

During the next hour or so, Cullen was told three times that he could not electioneer on the front steps to the High School, at the foot of the steps or on or next to the concrete apron at the bottom of the steps because those locations were not outside the statutorily prescribed distance from the polling place. (34a-36a)[11] When

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[9] The election took place while the February 13, 1992 charges were pending.

[10] The flier (reprinted at 78a) charged that the election "denie[d] democratic process" because three candidates were running for the same vacancy while two candidates were running unopposed; it also urged a vote against the unopposed candidates. The district court characterized the flier as "rather juvenile" (27a), observing that it "is rather a foolish thing to ask anyone to [vote against unopposed candidates] because it's of no consequence" (25a).

[11] At about 3:40, while Cullen was distributing fliers on the concrete apron at the bottom of the steps to the High School, Joseph Zanetti, Business Administrator for the District, told Cullen that what he was doing was illegal, that he was not

(continued...)

Police Officer John J. Kelly was dispatched to the High School, for example, he found Cullen handing out fliers near the curb leading to the concrete apron in front of the stairs to the High School. Officer Kelly told Cullen that under the election law, he could not pass out the fliers there because he was not 100 feet from the polling place. (36a) Officer Kelly also told Cullen that if he went to the intersection of Tornado Drive and School House Lane, he would be well outside the 100 feet, and escorted Cullen there. (36a)[12]

At about 4:30, District Clerk Nancy Bourke went to the front entrance of the High School and saw Cullen approach an automobile as it was parked immediately to the right of the bottom of the front steps of the school (approximately 70 feet from the entrance to the High School) and hand the driver one of his fliers. (37a) Ms. Bourke then called the Tuxedo Police Department to report that Cullen was again electioneering in front of the High School and was advised that a Police Officer would be sent. When Officer Gannon arrived, he spoke with Cullen inside the High School and told him that the doorways to the High School were the entrance to the polling place. Officer Gannon also gave Cullen a copy of New York State Election Law § 8-104, which prohibits electioneering within a 100-foot radius from the entrances to a polling place.[13]

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[11](...continued)
outside the statutory distance and that he must leave the location. Cullen refused to move. (35a) Soon after that, the Superintendent returned to the front of the High School and, in Mr. Zanetti's presence, directed Cullen to move to 100 feet from the front door of the High School. Cullen repeated that he would move only if so instructed by the police. (35a) Thereafter, Mr. Zanetti telephoned the Commissioner of Elections and confirmed that electioneering was prohibited within 100 feet of the front door of the polling place. The Commissioner also informed Mr. Zanetti of the provision for distance markers. (35a) Superintendent Fliegner then inquired of the School Custodian whether there were any distance markers but was told there were none. (36a)

[12] Soon afterward, Superintendent Fliegner told the District Clerk, Nancy Bourke, that he was leaving; that there had been some electioneering trouble with Cullen; and that if Ms. Bourke had any problem, she was to call the police. Both the Superintendent and the District Clerk were responsible for the conduct of the May 6 election. (38a)

[13] Section 8-104(1) of the Election Law is identical in all material respects to Section 2031-a(2) of the Education Law. (55a, 53a-54a) However, there is no criminal penalty for violation of Section 2031-a(2).

(37a) He then escorted Cullen to the intersection of Hillside Avenue and Tornado Drive, which both agreed was at least 100 feet from the entrances to the High School.

Superintendent Fliegner returned to the High School at about 8:30 p.m. While he and others were in the High School library waiting for the polls to close, one or more voters walked in holding up copies of Cullen's flier and said that a teacher was handing out the fliers in front of the steps of the High School. (37a-38a) Several Board members, the Superintendent and Ms. Bourke then went outside (between 8:40 and 8:45 p.m.) where they again found Cullen on the concrete apron in front of the steps of the High School. (38a) The Superintendent and the then President of the School Board told Cullen that he was violating the election laws and asked him to move from the area. When Cullen did not move, they returned to the High School to summon the police. (38a)

Around 8:50, Mr. Zanetti, returning to the High School, saw Cullen standing on the concrete apron at the foot of the front steps in possession of the fliers that he had been handing out. (38a) He approached Cullen, told him that what he was doing was illegal and directed him to leave. Cullen was then on the same concrete apron where he was standing at about 3:40 when Mr. Zanetti told him he was within the prohibited zone and was even closer to the entrance than he had been when directed by Officer Kelly to move. Nonetheless, Cullen said that he was beyond the 100-foot radius. Mr. Zanetti said that Cullen would "never learn." (38a)

It was stipulated below that, during the May 6 election, no distance markers were placed at a distance of 100 feet from the High School and no written notice of the prohibition on election activity was posted. (38a)[14] It was also stipulated that no one physically measured the distance of 100 feet from the High School entrance on or before May 6 or pointed out to Cullen on May 6

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[14] The District did not have distance markers and had not used them at previous elections. (33a) The Handbook for School Board Members, which Superintendent Fliegner consulted before the election, explains that "'electioneering' is prohibited within 100 feet of the polling place in school district elections." *School Law 1990*, at 65 (New York State School Boards Association 1990). It is silent, however, on the placement of distance markers. (33a)

specifically where 100 feet from the entrance was. (38a) Nor is there any evidence that Cullen asked either of the Police Officers with whom he spoke on May 6 (or anyone else) to tell him precisely where the 100 foot boundary was.

3. The Section 3020-a Proceeding: On September 3, 1992,[15] charges were preferred against Cullen based on the election day events—for "misconduct and/or conduct unbecoming a teacher and/or insubordination" consisting of three instances on May 6 (at approximately 4:30, 8:30 and 8:50 p.m.) when he "engaged in illegal electioneering in violation of Section 2031-a of the Education Law . . . after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election." (69a)[16] It was stipulated below that "[d]uring each incident forming the basis of the charges, [Cullen] was situated within 100 feet of the front doors of the High School." (39a)

Cullen requested a hearing and a three-member panel, chaired by James A. Cashen, Esq.,[17] was constituted. The hearing began on February 26, 1993, at which time the District presented its direct case. Cullen's counsel then stated that he had a right to seek a preliminary injunction staying the hearing on the basis that a First

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[15] Section 3020-a(1) permits charges to be filed against a teacher only during the period between the opening and closing of the school year. (38a-39a)

[16] The Teacher Handbook for the District sets forth standards for the conduct of teachers and other staff. Specifically, with respect to "Public Conduct on School Property," it provides in pertinent part:

> The Board of Education prohibits the following conduct or acts on school property by students, teachers, staff members, licensees or invitees * * *
>
> (9) The violation of any federal or state statute, local ordinance, or board policy.
>
> (10) The refusal or failure of any person to comply with a lawful order or direction of an official of the school district in the performance of his duties. (32a)

[17] Mr. Cashen is an attorney, arbitrator and mediator. He is a member of the panels of the American Arbitration Association, the New York State Public Employment Relations Board and the Federal Mediation and Conciliation Service. He is also designated as a panel arbitrator in a number of collective bargaining agreements. Courtney D. Gifford & William P. Hobgood, *Directory of U.S. Labor Arbitrators: A Guide for Finding and Using Arbitrators* 48 (BNA 1985).

Amendment issue was involved but would—"instead"—submit the constitutional claim to the panel. (40a) Accordingly, he requested that the panel decide the constitutional claim on a motion to dismiss before completing the hearing on the merits of the charges. It was stipulated that the entire panel would decide the motion, which would be limited to the First Amendment question. (40a) Both parties briefed the issue.

On April 16, 1993, Cullen's counsel was notified by telephone that his motion to dismiss had been denied, with the Employee Panel Member dissenting. On April 22, 1993, the panel issued its written decision, concluding that "charging Brian Cullen . . . for handing out fliers near the School District polling place, in defiance of directives . . . not to do so, did not restrict Mr. Cullen's right of free speech under the First Amendment." (47a-48a)[18]

The Commencement of This Action and the District Court Decision

Dissatisfied with the ruling on his motion to dismiss, Cullen commenced this action in the U.S. District Court for the Southern District of New York on April 20, 1993.[19] Cullen contended, as he had before the panel, that the charges against him were brought in bad faith and violated his right to freedom of speech under the First Amendment. He sought an order enjoining the Section 3020-a proceeding, as well as attorneys' fees. The District denied any violation of Cullen's First Amendment rights—relying on *Burson v. Freeman,* 112 S. Ct. 1846 (1992). It also urged dismissal of the

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[18] The panel (i) relied on this Court's decision in *Burson v. Freeman,* 112 S. Ct. 1846 (1992); (ii) specifically found that the placement of distance markers is "not a condition precedent to application of the electioneering prohibition under Section 2031-a(2) of the Education Law"; and (iii) found that "the directives of the District and Board officials were not intended to, and did not in fact, prevent [Cullen] from expressing his opinion." (48a)

[19] The jurisdiction of the district court was invoked pursuant to 42 U.S.C. §§ 1983 and 1985 and 28 U.S.C. §§ 1331 and 1343.

By order to show cause, the district court stayed all proceedings of the Section 3020-a panel pending further order of the court. The stay was later extended on consent as a temporary restraining order by order of the court, which also consolidated the hearing on the request for preliminary injunctive relief with trial on a permanent injunction.

action under the Abstention Doctrine enunciated in *Younger v. Harris,* 401 U.S. 37 (1971).

On May 28, 1993, the district court rendered its decision from the bench, permanently enjoining the Section 3020-a proceeding. (21a-29a) The court stated that the District could enforce the no electioneering prohibition in Section 2031-a "if [it] had posted the content neutral regulation as required by the statute *and* made it applicable to everybody *and* had someone there all day to enforce it as to everybody." (27a; emphasis added) In contrast, the court found the District's method of enforcement constitutionally deficient, characterizing it as "not narrowly tailored or content neutral" and "strictly ad homin[e]m." (27a) In that regard, the district court did not rely on evidence of selective enforcement, for there was none. Instead, it speculated that "there *may* have been other people standing within the 100 feet distance" as to whom the statute was not enforced. (26a; emphasis added)

As is evident from the Court of Appeals treatment of the abstention issue, it is not clear that the district court considered and decided that issue. It did, however, refer to "a past history of personal conflict with [Cullen] resulting in the making of charges and hearings and imposition of fines" as evidence of "animus." (24a) The court also concluded that the pending charges were brought "in bad faith," relying on its view that they "clear[ly]" could not be upheld given the absence of distance markers. (26a)

The Court of Appeals Decision

Over a cogent and pointed dissent by Judge Amalya L. Kearse, and citing no authority other than *Burson v. Freeman,* 112 S. Ct. 1846 (1992), a panel majority of the U.S. Court of Appeals for the Second Circuit held that finding Cullen in violation of Section 2031-a(2), absent the posting of distance markers or the functional equivalent thereof, would infringe upon his free speech rights under the First Amendment. The majority so held despite its acknowledgment that "irrespective of where the 100 foot boundary was located, [Cullen] was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police." (9a)

The majority's holding was premised on an assumption that there is a First Amendment right to electioneer at precisely 100 feet from a polling place. It also apparently presumed that the mere susceptibility of a statute to selective enforcement renders it constitutionally defective regardless whether it was in fact selectively enforced.[20] In essence, the panel majority concluded that, because the School District failed to post distance markers at 100 feet from the polling place, Cullen was privileged—even after he received actual notice of the electioneering prohibition—to continue to electioneer at locations he knew were inside the 100-foot zone.

Judge Kearse dissented, disagreeing with the view that there was no violation of Section § 2031-a because the District did not provide the notice required by the statute. "Though § 2031-a(1) requires the posting of notices," she said, "the prohibition in § 2031-a(2) is not conditioned on the posting of notices." (17a) On the First Amendment issue, Judge Kearse stated:

> I think the majority is far wide of the mark in holding that the defendants violated the plaintiff's constitutional rights by seeking to hold him responsible for violating N.Y. Education Law § 2031-a (McKinney 1988). . . .
>
> . . . I do not agree . . . that the failure of the school board to post markers showing the plaintiff where to stand in order to be *"just"* 100 feet away . . . gave him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away. (17a-18a; citations omitted)

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[20] The panel majority stated: "Allowing notice [of the electioneering prohibition] to be conveyed in the manner employed by the School District would *facilitate* (i) the curtailment of Appellee's First Amendment right to express his views to the voters as near to the polling place as the statute permits; and (ii) the selective enforcement of the prohibition on electioneering." (9a; emphasis added) With respect to selective enforcement, the majority acknowledged: "It may be argued that [Cullen] himself was in a position to know if such selective enforcement actually occurred, and would have offered evidence to that effect." (10a n.2) The majority went on, however, to quote with apparent approval the district court's speculation that "'there *may* have been other people standing within the 100 foot distance and speaking with each other.'" (10a n.2; emphasis added) Section 2031-a, however, prohibits only electioneering "in a public manner." (54a)

With respect to abstention, the panel majority "assume[d] that the district court concluded that the bad faith exception to the Younger doctrine was applicable." (13a)[21] Although acknowledging that the exception is "'narrow'" (13a), and expressing uncertainty as to the findings on which the district court justified its failure to abstain, the majority disposed of the abstention issue in three cursory paragraphs and with no evident consideration as to whether there was record support for the "findings" of the court below. "Presumably," the majority said, the findings on which the district court based its decision were: (i) its "apparent conclusion" that the charges were "in retaliation for the exercise of Cullen's right to protest the school board elections"; (ii) a "'past history of personal conflict' with Cullen"; (iii) the District's "'strictly *ad hominem*' manner" of enforcing Section 2031-a; and (iv) the "chilling effect" imposed by the charges and disciplinary proceeding. (13a) Describing the determination supported by these "findings" as not "clearly erroneous," the majority affirmed the district court's decision not to abstain. (13a)

No mention was made of Judge Kearse's agreement with the District's interpretation of Section 2031-a as evidencing that the charges were brought with a good faith belief that the statute had been violated; nor did the majority acknowledge that the previous disciplinary proceedings had resulted in findings of guilt. The authority cited by the majority on the abstention issue, moreover, was in stark contrast to the record here.[22]

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[21] Cullen submitted *sub judice* that all three *Younger* abstention factors were present. Accordingly, the panel majority assumed that the factors were present and confined its affirmance to the district court's (presumed) decision as to the applicability of the "bad faith" exception. (11a-12a n.4)

[22] *E.g., Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) (*per se* bad faith based on prosecution, in violation of immunity agreement, brought 13 years after plaintiff testified in exchange for immunity); *Shaw v. Garrison*, 467 F.2d 113, 117-19 (5th Cir.) (enjoining perjury prosecution because, *inter alia*, prosecutor's pre-trial conduct showed a "total disregard of" the plaintiff's rights, state witnesses had clearly committed perjury but were not prosecuted and prosecutor had a financial interest in prosecution), *cert. denied*, 409 U.S. 1024 (1972); *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988) (approving a temporary injunction based *inter alia* on allegations of "pervasive racism and

(continued...)

REASONS FOR GRANTING THE WRIT

During the more than two decades since *Younger v. Harris,* 401 U.S. 37 (1971), was decided, this Court has not approved a single intervention by the federal courts in a pending state proceeding on the basis of the "bad faith" exception so casually applied by the court below. Nonetheless, apparently failing to appreciate the significance of the principles that animate the Abstention Doctrine, the panel majority chose to decide a question of first impression under a New York State election law—without benefit of any New York State court interpretation of the law—and in effect declared that law (as well as the election laws of dozens of other states) unconstitutional as written. On that basis, the majority approved the enjoining of a disciplinary proceeding pursuant to the New York State Education Law involving charges against a teacher who admittedly defied repeated directives from school officials with respect to his conduct on school property. The majority justified that injunction by reference to a finding of "animus" based solely on prior disciplinary charges against the teacher—charges that the Commissioner of Education has found were warranted by the teacher's "pattern of irresponsible conduct with students" and "his pattern of insubordination." (124a)

Thus, this case is paradigmatic of the compelling considerations that underlie the federal restraint dictated by *Younger* and its progeny. The disregard by the panel majority below of important

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[22](...continued)
discriminatory treatment of blacks" in court system and direct evidence that prosecution was in retaliation for plaintiff's defense of a black minister in a state trial), *reh'g denied,* 851 F.2d 1108, *cert. denied,* 489 U.S. 1033 (1989). The majority also cited *Lewellen v. Raff* for the proposition that "the expectations for success of the party bringing the action need not be relevant." (14a) It apparently overlooked a later decision in that case in which the Eighth Circuit pointed out that the district court had found a substantial likelihood that the plaintiff "would establish that the prosecutor 'had no reasonable expectation of getting a conviction.'" 851 F.2d at 1110. In that later decision, the Eighth Circuit cited with approval *Smith v. Hightower,* 693 F.2d 359, 369 (5th Cir. 1982), which specifically held "that it is erroneous for a district court to refuse to consider evidence as to whether the prosecutors entertained a reasonable expectation of obtaining a conviction." 851 F.2d at 1109.

state interests, the legitimate authority of the state courts with respect to questions of state law and established principles of comity and federalism demonstrates a compelling need for guidance from this Court.

On the First Amendment question, which should not even have been reached by the courts below, the panel majority's decision rests on three fundamentally erroneous premises:

- That there is a First Amendment right to electioneer at precisely 100 feet from a polling place—a contention implicitly rejected by this Court in *Burson v. Freeman*, 112 S. Ct. 1846 (1992) and expressly rejected by the Fifth Circuit in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994);
- That the School District's failure to delineate the precise boundaries of the no electioneering zone constitutionally insulated Cullen from a hearing on his refusal to cease electioneering at locations known by him to be within the proscribed zone—a conclusion properly rejected by the dissent below and in conflict with the applicable decisions of this Court; and
- That an enforcement method is constitutionally deficient simply because it "make[s] possible" selective enforcement (11a) even if there is no evidence of selective enforcement—a notion at odds with this Court's holding in *Wayte v. United States*, 470 U.S. 598, 609 (1985), and decisions of virtually all the Circuit Courts of Appeal.

I. THE DECISION BELOW IS IN CONFLICT WITH *BURSON V. FREEMAN* AND OTHER DECISIONS OF THIS COURT, AS WELL AS THE FIFTH CIRCUIT'S DECISION IN *SCHIRMER V. EDWARDS*; IT ALSO CALLS INTO QUESTION THE CONSTITUTIONALITY OF ELECTION LAWS IN HALF THE STATES.

A. In *Burson v. Freeman*, 112 S. Ct. 1846 (1992) ("*Burson*"), this Court upheld Tennessee's election-day prohibition on political speech within 100 feet of polling places. Based on the history of election law regulation in this country, the plurality concluded that

a "wide-spread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud." 112 S. Ct. at 1855. It then proceeded to the question of "*how large* a restricted zone is permissible or sufficiently tailored." *Id.* at 1856.

On that question, given the compelling state interest at stake, a majority of the Court rejected the contention that the 100-foot boundary must be shown to be empirically necessary or "perfectly tailored" to achieve the state's purpose. *Id.* at 1857.[23] Rather, the test applied was whether the boundary is "'reasonable and does not *significantly impinge* on constitutionally protected rights.'" *Id.* (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)). The plurality continued:

> We do not think that the minor geographic limitation prescribed by § 2-7-11(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court is a difference only in degree, not a less restrictive alternative in kind.

Id. (citations omitted). The plurality acknowledged that "[a]t some measurable distance from the polls . . . government regulation of vote solicitation could effectively become an impermissible burden." *Id.* Declining to apply any "'litmus-paper test,'" however, the plurality found it "sufficient to say" that a 100-foot boundary is "on the constitutional side of the line." *Id.*

Thus, *Burson* established that there is no constitutionally protected right to political speech within a statutory 100-foot campaign-free zone while the polling place is open. Equally important, *Burson* did *not* establish that there is a constitutionally protected right to electioneer at precisely 100 feet—or at 110 feet—from the polling place. To the contrary, issues such as the outer

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[23] Justice Scalia, concurring in the judgment, found the statute constitutional as a "reasonable, viewpoint-neutral regulation of a nonpublic forum." *Id.* at 1859.

limit of the campaign-free zone and how the distance limitations are enforced are simply not questions of "constitutional dimension" (*id.*), provided that they are reasonable and do not significantly impinge on constitutionally protected rights (*id.*). Plainly, given the reasoning in *Burson*, it cannot be inferred that a statutory campaign-free zone suddenly poses an issue of constitutional dimension, or suddenly becomes a significant impingement on First Amendment rights, at 105 feet or even at 125 feet, from the polling place. Indeed, the U.S. Court of Appeals for the Fifth Circuit recently upheld the constitutionality of a Louisiana statute that proscribes campaign activity within a 600-foot radius of polling places. *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994).[24]

Thus, even assuming *arguendo* that the absence of distance markers "effectively prevented" Cullen from standing "*just* 100 feet from the polling place" (9a), that is not a matter of constitutional dimension. It may have been error for the District not to place the distance markers required by Section 2031-a(1) of the Education Law. Such an error, however, no more gives rise to a constitutional issue than would the mistaken placement of distance markers at a point 105 feet rather than 100 feet from the polling place. To paraphrase the Court in *Poulos v. New Hampshire*, 345 U.S. 395, 409 (1953), "[i]t would be unreal to say that such [a failure by the District] to act in accordance with state law, redressable by state judicial procedures, are state acts violative of the Federal Constitution."

B. The panel majority concluded that the School District's method of enforcing Section 2031-a did not provide "adequate notice" of "the parameters of the campaign free zone." (9a, 8a) Whatever the merit of that conclusion in the abstract, it is irrelevant here given the unanimous finding of the court below that Cullen

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[24] The Fifth Circuit emphasized the reasoning of the *Burson* plurality that the precise size of the campaign free zone is not a matter of "constitutional dimension" and that "'[r]educing the boundary . . . is a difference only in degree, not a less restrictive alternative in kind.'" 2 F.3d at 122 (quoting *Burson*, 112 S. Ct. at 1857). On that basis, it concluded that the 600-foot limitation was permitted by *Burson*.

was "well aware" that he was inside the proscribed zone when he continued to electioneer after being directed by the Superintendent and the police to cease doing so. (9a, 18a) Thus, the adequacy of the notice that Cullen received must be assessed in light of the conduct with which he was charged. As Judge Kearse stated in dissent, "the failure of the school board to post markers showing [Cullen] where to stand in order to be *'just'* 100 feet away . . . [did not give] him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away." (18a)

Judge Kearse's dissent is supported by this Court's decision in *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986), where a student was suspended based on the content of a speech he delivered to a school assembly. The School Handbook contained a disciplinary rule forbidding "the use of obscene, profane language or gestures." *Id.* at 678. In addition, before he delivered the speech, two teachers advised the student that the speech was "inappropriate" and that delivering it might have "severe consequences." *Id.* The student challenged his suspension on due process grounds, arguing that he did not receive adequate notice that the speech would subject him to discipline. Rejecting that argument, this Court stated: "The school disciplinary rule proscribing 'obscene' language *and the prespeech admonitions of teachers* gave adequate warning to Fraser that his lewd speech could subject him to sanctions." *Id.* at 686 (emphasis added).

In other circumstances as well, where a statute is challenged as void for vagueness, this Court has refused to accept hypothetical lack of notice arguments urged by persons whose conduct was squarely within the proscribed zone. As stated in *Parker v. Levy,* 417 U.S. 733, 756 (1974):

> None of [the distinctions we have drawn with respect to the required degree of precision in drafting] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute

> clearly applies may not successfully challenge it for vagueness.

See also Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973) ("even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions"); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 59 (1976) (rejecting vagueness challenge because "any element of vagueness in [the] ordinances has not affected these respondents").

C. A passive enforcement policy is not unconstitutional merely because it "make[s] possible" (11a) selective enforcement.[25] In *Wayte v. United States,* 470 U.S. 598 (1985), for example, this Court rejected a constitutional challenge to a policy of passive enforcement under which the Selective Service System investigated and prosecuted only persons who reported themselves, or were reported by others, as having violated the law requiring registration with the Selective Service. It was contended that this policy discriminated against "vocal" opponents of the registration program. Applying equal protection standards, the Court held that the party alleging selective enforcement was required "to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* at 608.

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[25] The panel majority seems to have treated this case as if it involved a facial challenge to a statute under the void-for-vagueness doctrine. Thus, rather than finding selective enforcement (of which there was no evidence), the panel majority spoke of the enforcement method used by the District as "facilitat[ing]" and "mak[ing] possible . . . selective enforcement." (9a, 11a) Whatever the scope and complexity of the doctrine that governs facial challenges to state laws (*e.g., Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988)), it is clear that this case does not involve a facial challenge to Section 2031-a of the Education Law. Beyond question, the gravamen of the Complaint is a challenge to the District's *application* of the no electioneering law to Cullen. (57a-68a) Moreover, this case does not—and could not—involve any contention that, in Section 2031-a(2) of the Education Law, the New York legislature failed to provide adequate standards for those who apply it or vested unfettered discretion in election officials to determine whether the no electioneering law has been violated. By its terms, Section 2031-a(2) establishes clear guidelines as to the parameters of the no electioneering zone as well as the public conduct that is not permitted within that zone.

Equally significant, under the enforcement policy at issue in *Wayte*, nonregistrants were told of their obligations under the law, given a grace period to comply and told that, if they refused, they would face possible prosecution. In concluding that vocal nonregistrants were not subjected to any special burden, the Court stated in words particularly apt here: "Indeed, those prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government." *Id.* at 610. Here too, Cullen in effect selected himself for discipline when he deliberately refused—after warnings—to cease electioneering at locations he knew to be within the statutorily proscribed zone.

In any event, in order to make a *prima facie* showing of selective enforcement, the plaintiff is required to demonstrate (i) that others similarly situated have generally not been prosecuted because of conduct that forms the basis for the charges against him, and (ii) that the government's discriminatory selection of him for prosecution was based upon an impermissible ground.[26] Here, there was no showing whatsoever of other "similarly situated" persons (*i.e.*, others electioneering within the 100-foot zone), let alone of similarly situated persons against whom the electioneering law was not enforced.

D. The implications of this case go far beyond the New York electioneering law and the Section 3020-a proceeding enjoined below. Election laws in as many as 26 states—like Section 2031-a(2) of the Education Law—establish a geographic zone around polling places in which campaigning is not permitted on election day, but do not require that the boundaries of the zone be defined

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[26] *See Rybachek v. United States*, No. 91-33160, 1993 U.S. App. LEXIS 26404, at *12 n.5 (9th Cir. Sept. 29, 1993) ("Unless similarly-situated nonvocal violators were not prosecuted, there has not been selective prosecution."); *see also United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir.), *cert. denied*, 493 U.S. 995 (1989); *United States v. Johnson*, 577 F.2d 1304, 1308 (5th Cir. 1978); *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983); *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978); *United States v. Scott*, 521 F.2d 1188, 1195 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *C.E. Carlson, Inc. v. Securities Exch. Comm'n*, 859 F.2d 1429, 1437 (10th Cir. 1988); *United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982).

by distance markers or signs.[27] All these states appear to contemplate enforcement of their campaign-free zones by (i) actual notice to the person engaged in electioneering within the zone and (ii) enforcement by the police of a request to leave the zone in the face of a refusal to do so. The panel majority nonetheless concluded that enforcing a no electioneering statute in this manner, "[a]bsent the posting of distance markers, or the functional equivalent thereof" (8a), would infringe upon the First Amendment right to electioneer at the statutorily permitted distance from the polling place (11a).

Thus, the decision below calls into question the constitutionality of election laws in fully half the states. If allowed to stand without review by this Court, it will at the very least engender widespread uncertainty regarding the enforceability of those laws—and perhaps encourage disruption at polling places throughout those states, thereby jeopardizing the very integrity and reliability of elections that the laws are intended to protect.

II. THE DECISION BELOW IS SO FUNDAMENTALLY AT ODDS WITH THE TEACHINGS OF THIS COURT IN *YOUNGER V. HARRIS* AND ITS PROGENY THAT SUMMARY REVERSAL IS WARRANTED.

A. In *Younger,* this Court held, based on long-standing principles of comity and federalism, that federal courts should

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[27] Ark. Code Ann. § 7-1-103 (Michie 1993); Cal. Elec. Code § 29470 (West 1989); Del. Code Ann. tit. 15, § 4942 (1993); Ill. Comp. Stat. ch. 10, para. 5/4-7 (Smith-Hurd 1993); Ind. Code Ann. § 3-14-3-16 (Burns 1993); Iowa Code Ann. § 49.107 (West 1991 & Supp. 1994); Kansas Stat. Ann. § 25-2430 (1993); Ky. Rev. Stat. Ann. § 117.235 (Baldwin 1982); La. Rev. Stat. Ann. § 18:1462 (West 1979 & Supp. 1994); Mich. Comp. Laws Ann. §§ 168.744, 168.931 (West 1989); Minn. Stat. Ann. § 211B.11 (West 1992 & Supp. 1994); Miss. Code Ann. § 23-15-895 (1993); Mo. Ann. Stat. 8-A §§ 115.635, 115.637 (Vernon 1980 & Supp. 1994); Neb. Rev. Stat. § 32-1221 (1988); N.J. Stat. Ann. §§ 18A:14-46, 18A:14-72, 18A:14-73, 18A:14-81, 19:34-6, 19:34-7, 19:34-15 (West 1989); N.M. Stat. Ann. §§ 20-1-20-16, 3-8-77 (Michie 1991); N.C. Gen. Stat. § 163-147 (1993); Okla. Stat. Ann. tit. 26, §§ 7-108, 16-111 (West 1991); Or. Rev. Stat. § 260.695 (1993); S.C. Code Ann. § 7-25-180 (Law. Co-op. 1991); S.D. Codified Laws § 12-18-3 (1982); Utah Code Ann. § 20A-3-501 (Supp. 1993); Wash. Rev. Code Ann. § 29.51.020 (West 1993); W. Va. Code Ann. § 3-3-2a (1994); Wisc. Stat. Ann. §§ 12.03, 7.37 (West 1986 & Supp. 1993); and Wyo. Stat. § 22-26-113 (1992).

refrain from enjoining state criminal proceedings. This Abstention Doctrine has been extended to quasi-criminal proceedings and to civil proceedings of the type involved here that implicate important state interests.[28] One source of the Abstention Doctrine

> is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. . . . *[A]n even more vital consideration [is] the notion of "comity," that is, a proper respect for state functions*, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 43-44 (emphasis added). A third important reason for *Younger* abstention is to avoid unwarranted determination of federal constitutional questions. *Moore v. Sims*, 442 U.S. 415, 429-30 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 445 (1977).

Younger itself recognized that there are exceptions to the Abstention Doctrine, but emphasized that they are "extremely limited." 401 U.S. at 56 (Stewart, J. concurring) "[E]ven irreparable injury," the Court said, "is insufficient unless it is 'both great and immediate.'" *Id.* at 46. Among the circumstances that this Court has identified as *not* sufficient, in and of themselves, to warrant the enjoining of a state proceeding are: (i) "the cost, anxiety, and inconvenience of having to defend against a single criminal

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[28] *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). The proceeding at issue here was unquestionably an ongoing state proceeding, judicial in nature (*see, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619); it implicates educational interests that are "precisely the sort of [state] interest which notions of comity and federalism . . . command the federal courts to respect" (*Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1017 (3d Cir. 1981)); and if dissatisfied with the ultimate decision of the panel, Cullen had an adequate opportunity for judicial review of his constitutional claim (N.Y. Educ. Law § 3020-a(5) (McKinney 1981)).

prosecution" (*Younger*, 401 U.S. at 46); (ii) "the existence of a 'chilling effect,' even in the area of First Amendment rights" (*id.* at 51); and (iii) the "facial invalidity of a statute" (*Huffman v. Pursue, Ltd.*, 420 U.S. 593, 602 (1975)).

The Abstention Doctrine permits intervention in ongoing state proceedings only in exceptional situations "where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is '"flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."'" *Huffman*, 420 U.S. at 611 (citations omitted). "[P]rosecutorial bad faith . . . in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *see also Perez v. Ledesma*, 401 U.S. 82, 85 (1971).[29] Similarly, multiple prosecutions, brought without regard to their outcome, may constitute irreparable harm within the meaning of the *Younger* doctrine because, in such circumstances, "the threat to the plaintiff's federally protected rights . . . cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46.[30]

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[29] *E.g.*, *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 88 (5th Cir. 1992) (approving refusal to abstain where multiple seizures of equipment were made after appellate court had held such seizures invalid); *Westin v. McDaniel*, 760 F. Supp. 1563, 1573-74 (M.D. Ga. 1991) (enjoining indictment where state had "no hope" of proving charges), *aff'd without op.*, 949 F.2d 1163 (11th Cir. 1991); *McGuire v. Roebuck*, 347 F. Supp. 1111 (E.D. Tex. 1972) (accord).

[30] *E.g.*, *Literature, Inc. v. Quinn*, 482 F.2d 372 (1st Cir. 1973) (seven arrests in eighteen months and a series of warrantless seizures); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) (over 100 charges of violation of anti-obscenity law in two years and none of eleven cases that had gone to trial resulted in convictions); *Video Store, Inc. v. Holcomb*, 729 F. Supp. 579 (S.D. Ohio 1990) (plaintiffs had successfully defended five criminal prosecutions and twelve more were pending). In determining whether a state proceeding was brought in bad faith, some lower courts have considered, *inter alia*, evidence of selective prosecution. *See, e.g.*, *Show-World Ctr., Inc. v. Walsh*, 438 F. Supp. 642 (S.D.N.Y. 1977) (granting a motion to preliminarily enjoin a vacate order allegedly issued on health and safety grounds where none of the other tenants.

(continued...)

A plaintiff asserting bad faith prosecution as an exception to the *Younger* doctrine must allege specific facts to support an inference of bad faith. "The Younger rule, as applied in *Hicks* [*v. Miranda,* 422 U.S. 332 (1975)], requires more than a mere allegation and more than a 'conclusory' finding to bring a case within the harassment exception." *Grandco Corp. v. Rochford,* 536 F.2d 197, 203 (7th Cir. 1976).

B. The "findings" on which the district court based its conclusion that the disciplinary charges against Cullen were brought "in bad faith" were few, vague and conclusory. Indeed, the panel majority found it necessary to engage in surmise as to the basis for the district court's determination. "Presumably" (13a), the majority said, it was based on:

- The district court's "*apparent* conclusion that . . . the charges . . . were brought in retaliation for the exercise of [Cullen's] right to protest the school board elections";
- A "'past history of personal conflict' with Cullen" and a "desire 'to do something about' him [that] rose to the 'level of animus'"—particularly the "'charges and hearings and impositions of fines' that preceded the School District's attempt to enforce § 2031-a against Cullen";
- The "'strictly *ad hominem*' manner" of enforcing Section 2031-a of the Education Law; and
- The "chilling effect" imposed on Cullen's First Amendment rights by the charges and the disciplinary proceeding. (13a; emphasis added)

The first three of these "findings," which superficially track circumstances recognized by some lower courts as constituting bad faith, do not withstand even minimal scrutiny. The fourth was expressly rejected by *Younger* as legally insufficient to warrant a refusal by the federal courts to abstain.

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[30](...continued)
who were not engaged in sexually oriented businesses, were forced to vacate); *but see Palmarozza v. Platt,* No. 86-0127, 1986 WL 2438 (E.D. Pa. Feb. 19, 1986) (selective prosecution is not an adequate reason to invoke exception to *Younger* doctrine).

The district court's finding that the charges were retaliatory was predicated solely on its view that there could be no violation of Section 2031-a in the absence of distance markers.[31] In other words, the district court concluded that the charges could not be sustained and, on that basis alone, inferred retaliatory motive. The question for the district court, however, "was not the guilt or innocence of the person charged; the question was whether the statute was enforced against [him] with no expectation of convictions but only to discourage exercise of protected rights." *Cameron v. Johnson,* 390 U.S. 611, 621 (1968).

Here, there is no basis from which it can properly be inferred that the District had no expectation that the charges would be sustained. There was (and is) no New York State court decision holding that the distance markers are a condition precedent to enforcement of Section 2031-a(2).[32] A majority of the Section 3020-a panel concluded that the placement of distance markers "was not a condition precedent to application of the electioneering prohibition." (48a) And, if there were any doubt as to the reasonableness of that view, it should have been eliminated when Judge Kearse reached the same conclusion. (17a) Thus, to the extent that the courts below based their determination of bad faith on a conclusion that the electioneering law had not been violated, they committed plain error.

The second "finding" relied on by the courts below—"animus" evidenced by the prior "charges and hearings and imposition of fines"—is a virtual parody of settled law. Multiple prosecutions,

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[31] The district court explicitly so stated: "the Court is convinced that no disciplinary charges would have been brought except for the content of the pamphlet, *since it's clear without a posting there was no violation.*" (26a; emphasis added) *See also* 26a ("the Court finds the disciplinary charges were brought in bad faith . . . *since [Cullen] could not be found to have violated the law because there were no markers there*") (emphasis added).

[32] As Judge Kearse pointed out, when the New York State Legislature intended to establish the posting of markers as a condition of enforcing a no electioneering prohibition, it knew how to do so. (17a) *See* N.Y. Educ. Law § 2609(4-a)(b) (McKinney 1981) ("*Where such markers are so placed* and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . .") (emphasis added).

brought without hope of success, may justify a federal court's intervention in state proceedings. *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *see also* note 30, *supra*. In such circumstances, "the threat to the plaintiff's federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46. This concern, however, assumes that the multiple prosecutions are brought without reasonable possibility of success. Here, in contrast, three of the four previous "charges" referred to by the district court were unanimously upheld by three-member panels constituted pursuant to the Education Law and were not even appealed by Cullen. (*See* pp. 4-5, *supra*.) The penalties previously imposed on Cullen, moreover, were imposed by three-member panels and by the New York State Commissioner of Education (not by the District). Absent impeachment of those impartial decision-makers (and there was none), there is no basis for any inference that the charges they sustained were brought for other than entirely legitimate reasons.[33]

Indeed, a bad faith claim was rejected by this Court in *Hicks v. Miranda*, based on a similar rationale. There, a three-judge court had allowed film distributors to bring a federal action challenging California's obscenity statute while criminal proceedings were pending against them, based on evidence of multiple seizures of copies of the film at issue as well as cash receipts from its showing. Characterizing the findings of bad faith and harassment as "vague" and "conclusory," the Court emphasized that each of the seizures had been pursuant to a valid warrant. Accordingly, the Court concluded, "[a]bsent at least some effort by the District Court to impeach the entitlement of the prosecuting officials to rely on repeated judicial authorization for their conduct, we cannot agree that bad faith and harassment were made out." 422 U.S. at 351.[34]

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[33] It also bears emphasis that Section 3020-a panels do not have access to a teacher's prior disciplinary record unless and until there has been a finding of guilt on the current charges. (*See* 70a, 99a.)

[34] *See also Collins v. County of Kendall*, 807 F.2d 95, 99 (7th Cir. 1986) ("[i]nstituting approximately thirty criminal prosecutions over a two-year period does not constitute bad faith or harassment in or of itself"), *cert. denied*, 483 U.S. 1005 (1987); *United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984)

(continued...)

The "finding" of selective (or "*ad hominem*") enforcement is equally flawed. The burden of showing selective enforcement rests on the party alleging that a statute has been selectively enforced. (*See* pp. 19-20, *supra.*) The courts below, however, improperly attempted to shift that burden by in effect requiring the School District to prove the *absence* of selective enforcement. A similar attempt was rejected by this Court in *Cameron v. Johnson*, 390 U.S. 611 (1968), where the federal plaintiffs had been arrested for picketing that obstructed ingress and egress from the courthouse in violation of an anti-picketing statute. Rejecting an argument that selective enforcement was shown by evidence of parades in the vicinity of the courthouse, the Court emphasized that "[t]here was no evidence of conduct . . . which would have brought the statute into play, let alone evidence that the authorities allowed such conduct without enforcing the statute." *Id.* at 622. Here, too, there is no evidence that anyone other than Cullen was electioneering within 100 feet of the High School, let alone that the School District permitted such conduct without enforcing Section 2031-a of the Education Law. As Judge Kearse stated in dissent, "the majority's hypothesis of possible selective enforcement of the prohibition against electioneering within 100 feet of the High School [is] a matter that is purely speculative." (17a)[35]

In the final analysis then, the determination that this case falls within the bad faith exception to the *Younger* doctrine rests exclusively on the "finding" that the disciplinary charges and the Section 3020-a proceeding "'imposed a chilling effect' on [Cullen's] First Amendment rights." (13a) Such a finding, however, cannot support a determination of bad faith, for "the existence of a 'chilling effect,'

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[34](...continued)
(multiple prosecutions do not support an inference of harassment where they generally result in convictions); *Grandco*, 536 F.2d at 204 ("Continued prosecutions under the ordinance for repeated violations indicates only good faith enforcement of a judicially approved provision against judicially disapproved conduct.").

[35] *See also Pincham v. Illinois Judicial Inquiry Bd.*, 872 F.2d 1341, 1350 (7th Cir. 1989) (refusing to find "bad faith" absent allegations that state agencies were aware of the activities of others similarly situated and treated them more favorably than the plaintiff as part of a campaign that used prosecutions, regardless of outcome, to suppress speech).

even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger*, 401 U.S. at 51. As the Seventh Circuit stated in *Pincham*, 872 F.2d at 1350, "[b]ecause [appellant] alleges nothing more than that a single state judicial disciplinary proceeding has had a 'chilling effect' on his free speech rights, he has failed to establish that 'extraordinarily pressing need for immediate equitable relief' required before coming within the purview of this exception to the *Younger* doctrine."[36]

In a sense, every enforcement proceeding seeks to deter or "chill" the conduct that is the basis of the charge. If bad faith could be found every time a statute under which an enforcement proceeding was brought is found unconstitutional, as the Court stated in *Hicks*, 422 U.S. at 352, "the rule of *Younger v. Harris* would be swallowed up by its exception." Under the *Younger* Abstention Doctrine, there is no access to the federal courts to enjoin a state enforcement action that is believed in good faith to be valid simply because the action may be (or is) ultimately found unconstitutional.

Finally, the courts below ignored that the Abstention Doctrine acknowledges that "federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, J. concurring). Here, federal adjudication of Cullen's claim entailed "unwarranted determination of federal constitutional questions" (*Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987)) because the Section 3020-a panel, the New York State Commissioner of Education, or the New York State Courts may have resolved this case (and still may) on state statutory or constitutional grounds. Thus, the New York State courts were denied the opportunity to

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[36] *See also, e.g., United Books*, 739 F.2d at 33 (assertion that state prosecution has had a "chilling effect" on First Amendment rights is insufficient to bring case within bad faith exception to *Younger* doctrine); *Williams*, 662 F.2d at 1022 n.14 (claim that state proceeding was brought "in retaliation for exercise of First Amendment rights" is insufficient to satisfy standards for exception to the *Younger* doctrine); *Suggs v. Brannon*, 804 F.2d 274, 278 (4th Cir. 1986) (complaint that bad faith enforcement of obscenity laws had a "chilling effect" on first amendment rights was insufficient to invoke exception to *Younger*).

address their own state law in an area of great interest to the state—state election practices and tenure disputes—and in a way that might have obviated the need for further consideration of Cullen's constitutional claim.

C. If the decision below is allowed to stand without review by this Court, it will have serious consequences for school districts throughout the states encompassed by the Second Circuit, and perhaps beyond, in an area of profound significance to the states—namely, the ability to maintain a qualified body of teachers willing and able to meet acceptable standards of conduct.[37] As this Court has stated, "education is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). It is equally clear that "a professional and competent body of teachers capable of meeting high standards of conduct" is "[e]ssential to the performance of this critically important function." *Williams*, 662 F.2d at 1017.[38] A federal court injunction ordering school district officials to cease action on disciplinary charges against a tenured teacher "cannot have other than a disruptive impact on the state's ability to ensure a competent and qualified body of teachers." *Id.* at 1018 n.10.

If review is not granted, the decision below will stand as an invitation to teachers faced with disciplinary charges to seek the intervention of the federal courts whenever the conduct that is the subject of the charges is even arguably protected by the First Amendment under some constitutional theory, no matter how novel or unfounded. Under the decision below, the federal court would be justified in deciding the alleged constitutional question based on nothing more than the so-called "chilling effect" imposed by the

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[37] Indeed, the potential disruptive impact of the decision below is not limited to school districts but extends as well to all public employers that provide for their employees pre-discipline due process proceedings similar to those afforded by Section 3020-a of the New York State Education Law.

[38] "Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

charges and the disciplinary proceedings themselves—an effect that will inevitably be present because the very purpose of disciplinary charges is of course to deter or "chill" the conduct on which it is based.

Ironically, moreover, given the reasoning of the panel majority, intervention by the federal courts would more readily be available to teachers against whom previous disciplinary charges had been brought—even if the charges had been sustained by impartial decision-makers such as a Section 3020-a panel or the Commissioner of Education. In the parlance of the district court, approved by the panel majority, such charges—no matter how meritorious—could provide the basis for an inference of "animus." (24a, 13a) Thus, as was the case here, teachers who have engaged in "a pattern of irresponsible conduct with students" or "a pattern of insubordination" (124a) could rely on their own past misconduct to justify an exception to the Abstention Doctrine.

CONCLUSION

Whatever the precise contours of the "bad faith" exception to the Abstention Doctrine, this case clearly does not fall within them. We therefore urge that the decision below be summarily reversed in light of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. In the alternative, because the questions presented are important, substantial and likely recurring, we urge that this petition for a writ of certiorari be granted and that the case be set for plenary review.

Respectfully submitted,

CAROLE O'BLENES
Attorney for Petitioner

SAUL G. KRAMER
STEPHANIE L. ORATZ
Of Counsel

May 27, 1994

APPENDIX A

Opinion and Judgment of the U.S. Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 3440 August Term, 1993

(Argued December 1, 1993 Decided February 28, 1994)

Docket No. 93-7685 '

BRIAN CULLEN,

Plaintiff-Appellee,

against

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants-Appellants.

B e f o r e: KEARSE, JACOBS, *Circuit Judges,* and CARTER, *District Judge.**

Appeal from a judgment entered in the United State District Court for the Southern District of New York, Brieant, *J.*,

* Honorable Robert L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

permanently enjoining a disciplinary proceeding brought pursuant to New York Education Law § 3020-a.

Affirmed.

Judge Kearse dissents in a separate opinion.

STEPHEN A. PERELSON,
New York City,
for Appellants.

ROBERT N. ISSEKS, Goshen,
New York,
for Appellee.

CARTER, *District Judge*:

This is a challenge to the method adopted by the Tuxedo Union Free School District to enforce New York State Education Law § 2031-a ("§ 2031-a"). Section 2031-a prohibits electioneering within 100 feet of a polling place during a school board election, and obligates the inspector of elections to place distance markers containing notice of the electioneering prohibition at a distance 100 feet from the polling place.[1] In the district court, Appellee did not

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[1] The complete statute reads as follows:

"§ 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet

(continued...)

challenge that portion of § 2031-a establishing the 100-foot, or "campaign free," zone. Rather, he attacked the means employed by the School District to enforce the statute on the grounds that the method chosen was not the least restrictive alternative for enforcing the statute, and thereby violated the First and Fourteenth Amendments. The district court agreed with Appellee, and so do we.

I.

Appellee, Brian Cullen, is a tenured high school science teacher who has been employed by the Tuxedo Union Free School District (the "School District") for the past 18 years. The School District, along with its superintendent, Dr. Herbert Fliegner (the

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[1](...continued)

from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon."

N.Y. Education Law § 2031-a (McKinney 1988).

"Superintendent"), and the six members of the School District's Board of Education, are Appellants in this appeal.

On February 15, 1990, the School District filed disciplinary charges alleging that Cullen 1) in violation of previous directives, took a group of students during the weekend on an unauthorized field trip in an aircraft to conduct a scientific experiment and 2) encouraged students to expose themselves, or "moon" him, in one of his classes. There had been no previous disciplinary charges filed against Cullen. The disciplinary panel dismissed the second charge as being "of no significance," but found Cullen guilty of the first and fined him $1250. The panel indicated, however, that Cullen "is clearly a very fine teacher."

On February 13, 1992, a new disciplinary charge was filed against Cullen alleging that, despite prior directives not to do so, he ignited the aerosol spray of Binaca Breath Spray in the presence of elementary grade school students in the school cafeteria where he was serving as a cafeteria lunch supervisor. After finding Cullen guilty of this charge, the disciplinary panel suspended him for four months without pay, despite the School District's argument that Cullen should be terminated. The School District is appealing the panel's penalty decision, currently pending before the New York State Commissioner of Education.

On May 6, 1992, at the George F. Baker High School, the School District held an election for candidates for its Board of Education and for a vote on the annual budget. The Superintendent and the District Clerk, Ms. Nancy Bourke, were responsible for the conduct of these proceedings.

The School District did not place distance markers 100 feet (or at any distance) from the entrance to the High School during the course of the May 6, 1992 election. No written notice was posted advising the public of the electioneering prohibition, nor did anyone physically determine where the 100-foot campaign free zone actually ended. In the previous nine years (through 10 elections), the School District did not use distance markers—and indeed did not possess any such markers—in any of these elections.

At about 3:30 p.m. on May 6th, after his work day had ended (in accordance with the terms of the teachers' collective bargaining agreement), Appellee began to distribute copies of a flier protesting the fairness of the ongoing election and encouraging voters to vote "no" for the two incumbent Board of Education members, who were running unopposed. Appellee was positioned approximately 41 feet from the entrance door of the High School. At about the same time, a member of the School District staff advised the Superintendent of what Cullen was doing.

The Superintendent approached Appellee and requested that he remove himself from the steps of the High School because the law required that he be at least 100 feet from the entrance to the High School if he wanted to engage in any electioneering. Appellee replied that he was doing nothing wrong, that it was after school hours and the Superintendent could not tell him to do anything, and that he would not move unless instructed to do so by a police officer. The Superintendent repeated his order to move, and on Appellee's failure to do so called the Chief of Police, asking him to send an officer to the High School to instruct Appellee to move to an appropriate distance from the polling place.

At about 3:40 p.m., while the Superintendent was calling the police, Joseph Zanetti, the School District's Business Administrator, observed Appellee handing out fliers. Zanetti advised Appellee that he was not outside the required statutory distance and that he must cease distributing fliers there and remove himself. As he had done with the Superintendent, Cullen refused to move unless the police asked him to. At this point, the Superintendent returned, requested that Zanetti remain as a witness, and, in Zanetti's presence, instructed Cullen to remove himself to 100 feet from the front door of the High School. Appellee again refused to move unless ordered to do so by the police.

Police officer John J. Kelly arrived at the High School shortly thereafter, and found Appellee still handing out fliers less than 100 feet from the front of the High School. The police officer told Appellee that he could not distribute the fliers within 100 flier of the High School, and that doing so violated state law. Appellee indicated to the police officer that he was not aware of the state law

and that he would move. The police officer then indicated a spot where Appellee could stand that would be "well outside" the 100 foot zone.

The Superintendent observed Appellee at this new location for approximately 15 or 20 minutes until 4:15 p.m., at which time the Superintendent left the High School. Prior to leaving, the Superintendent told the District Clerk that there had been trouble with Appellee electioneering within the campaign free zone, and instructed her to call the police if she had any further problems.

At approximately 4:30 p.m., the District Clerk observed Appellee handing out fliers within 100 feet of the High School's front doors. After phoning the police, she advised Appellee that he could not hand out fliers within 100 feet of the entrance to the High School.

A second police officer soon arrived and gave Appellee a copy of New York State Election Law § 8-104, which sets forth an electioneering prohibition similar to the one contained in § 2031-a. Appellee agreed that the 100 foot prohibition extended from the front door of the High School, and the police officer then escorted Appellee to a point that they both agreed was beyond the 100 foot zone.

Nothing in the record establishes Appellee's whereabouts or activities, or if any prohibited electioneering occurred, between 4:30 p.m. and 8:30 p.m. At about 8:30 p.m., the Superintendent returned to the High School. While he was standing inside, one or more voters came into the High School carrying Appellee's flier and told the Superintendent that one of the teachers was handing them out at the front of the steps of the High School. The Superintendent, the District Clerk, the Business Administrator and several members of the Board of Education then went outside, and Appellee was again advised that he was violating state law and was asked to move. Appellee did not move, and the Superintendent went to call the police. It is uncertain whether a police officer came to the High School this third time.

Between 8:50 p.m. and the close of the polls at 9:00 p.m., Appellee continued to hand out the fliers at the front of the steps of

the High School. The Business Administrator approached Appellee and told him that what he was doing was illegal and directed him to leave. Appellee replied that he was beyond the 100-foot radius.

On February 26, 1993, a disciplinary panel established pursuant to New York State Education Law § 3020-a (the "§ 3020-a panel") heard charges that Appellee had violated § 2031-a on three separate occasions on May 6, 1992. After the presentation of the School District's case and over the objection of the School District's counsel, Appellee's counsel stated that Appellee had a right to seek a preliminary injunction staying the disciplinary proceeding because a First Amendment issue was involved, but that counsel would instead seek to submit to the § 3020-a panel a motion to dismiss based upon this First Amendment issue.

Ultimately, the School District's counsel agreed, and the § 3020-a panel agreed to hear the motion to dismiss based upon the constitutional claims only. Both sides briefed the issue, and Appellee's motion was denied.

After learning of the § 3020-a panel's denial of his motion, Appellee commenced this action in the district court for the Southern District of New York seeking to enjoin the disciplinary proceeding against him. Following the parties' stipulation to the relevant facts and oral argument, the district court rendered a decision from the bench. The court found that Appellants' prosecution of the charges and the commencement of the disciplinary proceeding violated Appellee's First Amendment free speech rights, and so permanently enjoined Appellants from continuing with the proceeding. Appellee had sought no money damages. Judge Brieant directed Appellants to pay Appellee's legal fees in the amount of $19,082.65. This appeal followed.

II.

Appellee contends that the School District's haphazard method of enforcement failed to provide adequate notice of the 100 foot boundary, and that therefore his conduct did not (and could not) constitute a criminal violation of § 2031-a. It follows, according to Appellee, that there was no justification for the

disciplinary proceedings instituted by the School District. We agree.

Section 2031-a explicitly requires the posting of "distance markers at a distance of one hundred feet from the polling place." N.Y. Education Law § 2031-a(1) (McKinney 1988). These markers demarcate the boundary of the campaign free zone and provide notice to the public of the prohibition on electioneering within the zone. The markers are to be set up at least one-half hour before the polls open on election day, and are to remain up until the polls close. This scheme minimizes the potential for arbitrary or discriminatory enforcement by providing to the public uniform and continuous notice of what constitutes electioneering and of where electioneering is prohibited. School officials, who otherwise lack discretion to determine whether a violation of the statute has occurred, are therefore not relied upon personally to notify the public of the existence of the electioneering prohibition or to indicate the campaign free zone's boundary.

The School District disregarded this statutory notice requirement, and, instead, adopted a method of enforcement more suited to its own convenience. Its method of enforcement provided no notice of either the parameters of the campaign free zone or the nature of the electioneering prohibition itself. Nothing was used in lieu of the distance markers, nor was any one person assigned the responsibility of monitoring the campaign free zone for electioneering violations. Moreover, the 100 foot distance from the High School has never been measured, so no School District employee even knew where the campaign free zone actually ended. In fact, there is no indication that the School District had attempted to enforce § 2031-a prior to the May 6, 1992 election.

Absent the posting of distance markers, or the functional equivalent thereof, there was no way for Appellee (or anyone else) to identify the 100 foot boundary beyond which electioneering was permitted. The Superintendent's effort to give Appellee notice of the boundary consisted of nothing more than a warning that the High School steps were within 100 feet of the polling place. Once the Superintendent had confirmed for himself that Appellee had violated the electioneering prohibition, he made no attempt either

to post notice of the prohibition or to conduct regular inspections of the campaign free zone.

The two police officers summoned to the High School also failed to advise Appellee precisely where the 100 foot line was drawn. One police officer merely indicated a spot "well outside" the 100 foot zone, and the other escorted Appellee to a point safely beyond that zone. Like the Superintendent, the police officers seemed focused only on removing Appellee from the campaign free zone, and not with the importance of notifying the public of the electioneering prohibition so as to avoid similar difficulties with Appellee or others in the future.

It is true that irrespective of where the 100 foot boundary was located, Appellee was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police. At no time, however, was Appellee advised of the precise location of the 100 foot boundary. Accordingly, the oral statements did not (and could not) provide adequate notice of the restricted area so as to justify penalizing Appellee (or anyone else) under § 2031-a. Allowing notice to be conveyed in the manner employed by the School District would facilitate (i) the curtailment of Appellee's First Amendment right to express his views to the voters as near to the polling place as the statute permits; and (ii) the selective enforcement of the prohibition on electioneering.

Appellee's First Amendment interest in staking out his vantage at the 100 foot line was no less compelling than the School District's interest in ensuring that he did not cross it. Taking together everything Appellee was told by the Superintendent and the police, his only choice was to stand either *more* than 100 feet away from the polling place or *less* than 100 feet away. What he could not do, however, was exercise his statutorily protected right to stand *just* 100 feet from the polling place. The School District effectively prevented Appellee from exercising his First Amendment right to the full extent allowed under the statute (and under *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846 (1992)).

The School District's method of enforcement also facilitated the arbitrary and discriminatory enforcement of § 2031-a. To the degree that the School District sought to enforce the electioneering prohibition at all, its efforts would appear to have been focused exclusively on the activities of Appellee, someone with whom the School District "had a past history of personal conflict."[2] By the time the polls had closed, the Superintendent, the Business Administrator, the District Clerk, the President of the Board of Education, the Vice-President of the Board of Education and one additional member of the Board of Education had all, alone or together, confronted Appellee over his electioneering activities. When the Superintendent left the High School at 4:15 p.m., he told the District Clerk specifically that there had been "trouble" with Appellee over his electioneering, and that she should call the police if there were any further problems.

In fact, the School District's ability to document Appellee's activities is in dramatic contrast to the virtual absence of information abouth the activities of others. The School District cannot establish whether anyone violated the electioneering prohibition prior to 3:30 p.m.—it knows only that Appellee did so approximately at that time. Further, it cannot establish whether anyone other than Appellee violated the prohibition after 3:30 p.m.—it has only documented Appellee's activities. This failure demonstrates that the School District's enforcement method is susceptible to discriminatory or arbitrary application. A government

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[2] It may be argued that Appellee himself was in a position to know if such selective enforcement actually occurred, and would have offered evidence to that effect. As the district court noted, however, "in a contested election there may have been other people standing within the 100 feet distance and speaking with each other or greeting each other or making comments." The School District's failure to provide adequate notice of the 100 foot boundary meant that no one (other than Appellee) would be warned of the electioneering prohibition and thereby inhibited from discussing the issues and promoting the candidates right up to the polling booths themselves.

body charged with enforcing a law that seeks to preserve the delicate balance between the exercise of First Amendment rights and the promotion of fair and honest elections should not be permitted to ignore safeguards designed to preserve that balance, and then, at day's end, be able to report only on the activities of a single individual with whom bad blood already existed.

In short, Appellee did not violate § 2031-a because the School District did not provide the notice required by that statute.[3] Holding otherwise would infringe upon Appellee's First Amendment (and statutory) right to electioneer 100 feet from the polling place and make possible the selective enforcement of the prohibition on electioneering.

III.

Appellants contend that the district court should have abstained from deciding Appellee's constitutional claims. The federal abstention doctrine, first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), is based on the premise that ordinarily a state proceeding provides an adequate forum for the vindication of federal constitutional rights, *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), and so due deference ought to be paid the principles of comity and federalism. *Younger*, 401 U.S. at 44. *Younger* abstention applies to state judicial and administrative proceedings, so long as the state court has a means of reviewing constitutional claims. *See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627-29 (1986).[4]

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[3] This conclusion is buttressed by the fact that no arrests were made by the police and no criminal charges were filed by the District Attorney.

[4] Before a federal court can abstain under the *Younger* doctrine, three factors must be present. First, there must be an ongoing state proceeding. *See Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987). Second, an important state interest must be

(continued...)

Nevertheless, federal courts should still afford injunctive relief to a plaintiff who successfully establishes "the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that ha[s] always been considered sufficient to justify federal intervention." *Younger,* 401 U.S. at 48. Intervention would still be warranted upon a showing of "bad faith, harassment or any other exceptional circumstance that would call for equitable relief." *Id.* at 54. Generally, for such a showing to be made, the party bringing the state action must have no reasonable expectation of obtaining a favorable outcome. *See Kugler,* 421 U.S. at 126 n.6. But, a refusal to abstain is also justified where a prosection or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass. *E.g., Lewellen v. Raff,* 843 F.2d 1103, 1109-10 (8th Cir. 1988), *cert. denied,* 489 U.S. 1033 (1989) (bad faith prosecution where brought in retaliation for exercise of First Amendment rights); *Rowe v. Griffin,* 676 F.2d 524 (11th Cir. 1982) (bad faith prosecution where brought after assurances of immunity to defendant).

In such cases, a showing of retaliatory or bad faith prosecution establishes irreparable injury for the purposes of the *Younger* doctrine, *Bishop v. State Bar of Texas,* 736 F.2d 292, 294 (5th Cir. 1984); *Shaw v. Garrison,* 467 F.2d 113, 119-121 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972), and the expectations for

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[4](...continued)
implicated in that proceeding. *Id.* Third, the federal plaintiff must have an adequate opportunity for judicial review of his constitutional claims during or after the proceeding. *Id.* In his brief to this court, Appellee submitted *sub judice* that the three *Younger* doctrine factors were present, and so we assume *arguendo* that, for the purposes of this decision, they are present. Further, because we believe that the district court based its determination not to abstain upon the applicability of the "bad faith" exception to this case, we confine our affirmance to the district court's conclusion.

success of the party bringing the action need not be relevant. *See, e.g., Lewellen,* 843 F.2d at 1109-10 (injunction justified regardless of expectations where prosecution brought to discourage exercise of constitutional rights). Abstention would serve no purpose because a state cannot have a legitimate interest in discouraging the exercise of constitutional rights, *see e.g., id.* at 1110, or, equally, in continuing actions otherwise brought in bad faith, thereby reducing the need for deference to state proceedings.

Although the district court did not explicitly address the abstention doctrine in its opinion, it found that the disciplinary charges had been brought in "bad faith." We, therefore, assume that the district court concluded that the bad faith exception to the Younger doctrine was applicable. Although the specific findings in the district court's opinion were few in number, they nevertheless provide the basis for the court's apparent conclusion that Appellants sought Cullen's termination and that the charges that Cullen violated § 2031-a were brought in retaliation for the exercise of Cullen's First Amendment right to protest the school board elections.

Appellants, according to the district court, had a "past history of personal conflict" with Cullen, and their corresponding desire "to do something about" him rose to the "level of animus." More specifically, the court took note of the "charges and hearings and imposition of fines" that preceded the School District's attempt to enforce § 2031-a against Cullen. With respect to this enforcement, the district court found that Appellants had pursued Appellee in a "strictly *ad hominem*" manner, and the charges themselves, along with the disciplinary proceeding that followed, "imposed a chilling effect" on Appellee's First Amendment rights.

Presumably, it was on these findings that Judge Brieant grounded his determination that the bad faith exception to the *Younger* doctrine applied. Although the exception has been deemed a "narrow" one, *see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), we do not find the district court's determination to be clearly erroneous. *See* Rule 52(a), Fed. R. Civ. P. Because the State of New York cannot have a legitimate interest in the disciplinary proceeding, permitting it to continue would not serve

the purposes of the *Younger* doctrine, and so the district court's decision not to abstain is affirmed.

IV.

Appellants claim that Appellee waived his right to have his constitutional claims heard by the district court. They argue that by seeking to have his motion to dismiss heard by the § 3020-a panel after the presentation of Appellants' case and by basing this motion upon alleged First Amendment violations, Appellee lost the chance to bring his First Amendment claim directly in federal court.

Article III does not confer upon litigants an "absolute right" to have all claims decided by an Article III court. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). This "personal right" is subject to waiver, much like other personal rights that define the procedures used to try civil and criminal matters. *Id.* at 848-49; *Collins v. Foreman*, 729 F.2d 108, 120 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984). Such a waiver may be either implicit or explicit, *see Schor*, 478 U.S. at 849, however, a litigant's consent to submit a claim to the jurisdiction of a non-Article III forum must be freely and voluntarily given. *Collins*, 729 F.2d at 120; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix*, 725 F.2d 537, 543 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984); *U.S. v. Dobey*, 751 F.2d 1140, 1143 (10th Cir.), *cert. denied*, 474 U.S. 818 (1985).

We are uncomfortable finding an explicit waiver where as here the record is devoid of the slightest indication that either Appellee's counsel or any member of the § 3020-a panel possessed an awareness that Appellee's right to have his claims heard by an Article III forum might be in jeopardy of being waived. *See Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (it would be "fitting and appropriate for [a waiver] determination to appear upon the record"); *U.S. v. Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) ("the preferred practice [for obtaining a waiver] would be for the court to advise the defendant of his rights . . . and, if the defendant so desires, obtain an intelligent and knowing waiver on the record"). Further, we have not been made aware of any off-the-record conversations between Appellee and any

member of the § 3020-a panel in which a waiver might have been effected, *see Polizzi v. U.S.*, 926 F.2d 1311, 1319 (2d Cir. 1991), or of any other explanation or personal recollection by any member as to why a waiver might not have appeared on the record. *See id.* at 1320-21. In essence, there is no evidence that any panel member showed an understanding that a waiver might possibly have been effected—the possibility of waiver was neither broached nor hinted at.

Appellee likewise gave no indication that his request to have the § 3020-a panel hear the motion to dismiss might have effected a waiver of his right to bring the constitutional claims directly in federal court. No questions were posed either to Cullen or his counsel to elicit or confirm whether he had consented to waive his Article III rights. Rather, his counsel stated only that Cullen sought to have the § 3020-a panel decide the motion rather than requiring him to continue further with the disciplinary proceeding or "forcing" him to bring a claim in federal court, which he stated Cullen would do if the § 3020-a panel refused to hear the motion.

Appellee, nonetheless, may have waived his right implicitly. *See Schor*, 478 U.S. at 849. In *Schor*, the Court found that Schor had effectively waived his right to appear before an Article III court after he first insisted that a common law counterclaim against him be brought in the administrative tribunal where he had already initiated a related statutory matter, and then, after losing on this counterclaim, sought to remove the counterclaim to federal court. *Id.* at 849-50.

However, unlike *Schor*, Cullen did not seek to manipulate forums or otherwise abuse the judicial process, nor, in fact, did he initially choose the non-Article III forum to hear his claim. On this basis, we cannot find that an implicit waiver was freely and voluntarily given.

V.

The district court awarded Appellee attorney's fees in the amount of $19,082.65. Part of the award was for time spent in preparation for, and attendance at, the disciplinary proceeding

against Appellee. It is this part of the award that Appellants now challenge.

The Supreme Court has emphasized that the district court has discretion in determining the amount of a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Upon appeal of a fee award, "the reviewing court must evaluate its reasonableness with appropriate deference." *Webb v. County Bd. of Educ.*, 471 U.S. 234, 244 (1985).

A federal court may award attorney's fees to a prevailing civil rights litigant. 42 U.S.C.A. § 1988 (West Supp. 1993).[5] Attorney's fees may also be awarded for work done in a prior administrative proceeding which "'was both useful and of a type ordinarily necessary to advance'" the subsequent § 1988 civil rights litigation. *N. Carolina Dept. of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6, 15 (1986); *Webb*, 471 U.S. at 243-44.

Appellee is not asking that all fees incurred in connection with the disciplinary proceedings be reimbursed, but rather only a "discrete portion" of the fees so incurred. *See Webb*, 471 U.S. at 243; *N. Carolina Dept. of Transp.*, 479 U.S. at 15. The district court found both "useful" and "ordinarily necessary" that portion of the work done by Appellee's counsel in preparing for and in attending the disciplinary proceeding. Further, Appellee appropriately excluded from his request those fees incurred that were particular to the disciplinary proceeding and could not be transferred to the district court action. Given the particular nexus between the work in the disciplinary proceeding for which fees were requested and the demands of the district court action, we see no reason to reverse the district court's finding that this "discrete portion" of counsel's work be reimbursable to Appellee.

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[5] The district court indicated in its opinion that Appellants had conceded that Appellee was entitled to recover his attorney's fees under § 1988.

CONCLUSION

We affirm the district court's decision permanently enjoining Appellants from bringing or maintaining any disciplinary proceedings against Appellee arising out of the events of May 6, 1992 and the district court's award of attorney's fees to Appellee.

KEARSE, Circuit Judge, dissenting:

I respectfully dissent.

Leaving aside my disagreement with the majority's hypothesis of possible selective enforcement of the prohibition against electioneering within 100 feet of the High School, a matter that is purely speculative since the plaintiff apparently has never claimed even to have seen anyone else who might have been electioneering in the area where he was, I think the majority is far wide of the mark in holding that the defendants violated the plaintiff's constitutional rights by seeking to hold him responsible for violating N.Y. Education Law § 2031-a (McKinney 1988).

First, I disagree with the majority's view that the plaintiff in this case "did not violate § 2031-a because the School District did not provide the notice required by that statute." Majority opinion *ante* at 13. Section 2031-a(2) provides that "no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . ." Though § 2031-a(1) requires the posting of notices, the prohibition in § 2031-a(2) is not conditioned on the posting of notices. *Compare* § 2031-a *with* N.Y. Education Law § 2609(4-a)(b) (McKinney 1981) ("*Where such markers are so placed* and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom . . . ." (emphasis added; emphasized language does not appear in § 2031-a(2))).

Further, even assuming that the plaintiff was ignorant of the law that forbade him to engage in electioneering activities within 100 feet of the school, and that his ignorance of the law gave him an excuse initially for electioneering activities within that range, he

plainly knew of the prohibition after a policeman was called and removed him from the 100-foot area.

Finally, even accepting the proposition that without physical signs demarking the area 100 feet from the High School this plaintiff did not know just how far away from the High School 100 feet extended, I cannot accept the proposition that he did not know that the High School steps were within 100 feet of the school.

As the majority concedes, "irrespective of where the 100 foot boundary was located, Appellee was well aware that he was inside it when he continued electioneering on the High School steps after speaking with the Superintendent and the police. *Ante* at 10. I do not agree with the majority that the failure of the school board to post markers showing the plaintiff where to stand in order to be "*just*" 100 feet away, *ante* at 11 (emphasis in original), gave him license to stand 0 feet away in the guise of lack of notice and to hold defendants liable for allegedly violating his right to campaign exactly 100 feet away.

APPENDIX B

Judgment of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants	CIVIL JUDGMENT

The issues in the above entitled action having been brought on for a consolidated hearing and non-jury trial on May 28, 1993, before the Honorable Charles L. Brieant, United States District Judge, and at the conclusion of said consolidated hearing and trial, the Court having made its findings of fact and conclusions of law in favor of the plaintiff and against the defendants, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment hereby (1) declaring that the New York State Education Law Section 3020-a proceeding, consisting of three charges preferred against the plaintiff on September 3, 1992, was commenced and prosecuted by the defendants in violation of the plaintiff's right to free speech as guaranteed by the First Amendment to the United States Constitution, (2) permanently enjoining the defendants from continuing with the prosecution of

said 3020-a proceeding, and (3) directing the defendants to pay the plaintiff's legal fees and disbursements in the amount of $19,082.65, together with taxable costs of this action.

Dated: White Plains, New York
June 21, 1993

APPROVED:
SO ORDERED:

/s/ Charles L. Brieant
U.S.D.J

/s/
Clerk

APPENDIX B (cont'd)

Findings of Fact and Conclusions of Law of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiffs,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNO AND THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

93 Civ. 2569

United States Courthouse
White Plains, New York

May 28, 1993

Before:

HON. CHARLES L. BRIEANT,
District Court Judge

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Attorneys for Defendants
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BY: MARK C. RUSHFIELD, Esq., of Counsel
STEPHEN PERELSON, Esq., of Counsel

PROCEEDINGS

THE CLERK: Cullen against Fliegner, et al.

THE COURT: Good afternoon. The Court appreciates the fact that you have undertaken to permit the Court to try this case on the stipulated statement of facts, which I presently have here before me. And I am now prepared to hear counsel, if there's anything other or further that any of you want to bring to the attention of the Court at this time.

MR. ISSEKS: Thank you. First, there are two additional facts which we would like to stipulate to that were inadvertently left out of the stipulation that was submitted to the Court. These facts could be added on to paragraphs 36 and 37 of the stipulation.

THE COURT: If you've agreed on it, please read it into the record.

MR. ISSEKS: Added on to paragraph 36 would be that there was no person designated by the defendants to monitor

electioneering outside the entrance of the high school to make sure that there was no electioneering in 100 feet of that entrance.

MR. RUSHFIELD: That's acceptable to the defendants, your Honor.

THE COURT: So stipulated.

MR. ISSEKS: The second is, in addition to paragraph 37, the second sentence should be amended to read the 1991-92 school year —

THE COURT: Where are you now, sir?

MR. ISSEKS: The second sentence of paragraph 37.

THE COURT: Yes.

MR. ISSEKS: The 1991-1992 school year during which the May 6, 1992 election occurred closed on June 26, 1992.

MR. RUSHFIELD: That is also acceptable to the defendant, your Honor.

THE COURT: All right, thank you.

MR. RUSHFIELD: Thank you, your Honor.

THE COURT: Now, as I gather, your client has no damages.

MR. ISSEKS: That's correct, your Honor.

* * *

THE COURT: This is a grudge fight that escalated beyond belief, it really has. I think the Court has to make its findings and conclusions in this matter, and the Court will now do so. And when I'm finished, if there's some additional finding or conclusions that you wish to have the Court make, I'll ask you one by one.

The Court finds every fact set forth in the stipulated statement of facts, and I don't feel any need to repeat them, although it's possible that in my oral analysis of this case I might do so.

The Court has indicated in informal discussions with counsel, and presently now confirms on the record, that I do not think it is probative of anything relevant to the decision in this case the fact that no charges were filed between the date of the school election on May 6, 1992 and June 26 when the open period during which charges can be filed against a teacher expired. The charges are not time-barred, as the Court understands it. And the fact that the charges were not filed until September is not a fact upon which this court relies or draws any inference adverse to the defendants. However, the Court does infer that it's clear from the record here and from responses and activities of the various participants that the defendants generally have had a past history of personal conflict with the plaintiff resulting in the making of charges and hearings and imposition of fines, and that the plaintiff, that the plaintiff shows that the plaintiff have a desire to do something about this particular defendant which rises to level of a animus and which must be considered in the analysis of what they did and why.

On April 20, 1993, this Court signed an order to show cause for a preliminary injunction enjoining the defendant, Tuxedo Union Free School District from continuing or pursuing their pending disciplinary proceeding against the petitioner Brian Cullen pursuant to New York State Education Law, section 3020-A, till a hearing and determination of the merits of this action could be held by the Court, the Court finding that it was apparent that the First Amendment rights of the plaintiff were subject to possible infringement here, and that even the hearing itself or the conduct of the hearing and the filing of the charges standing alone had a chilling effect on his First Amendment rights which was inappropriate under all the circumstances and that attempts to impose time and place restrictions on the exercise of his First Amendment rights was neither content neutral nor limited only to him.

The case involved section 2031-A of the election law, which provides similarly to laws regulating general elections and familiarity with that statute is assumed but essentially the statute imposes a duty on the inspectors of election to place conspicuously distance markers at a distance of 100 feet from the polling place,

and such distance markers shall indicate the prohibition contained herein and shall be placed some one half hour before the opening of the polls and shall remain till the polls are closed.

And the statute goes on to provide that no person shall do any electioneering within the polling place or 100 feet therefrom in any public street or within such distance in any place in a public manner.

And it goes on to provide about posters and the like and other provisions which are not directly relevant to this case, and the distance is 100 feet radial measured from the entrances, designated by the inspectors of election, to the building where the election is being held. And the Court assumes that the entire statute is a part of its findings and conclusions.

Plaintiff is a high school teacher in the Union Free School District in Tuxedo, and on September 3, 1992, the district filed disciplinary charges against the plaintiff which alleged that on May 6, 1992, he engaged in illegal electioneering in violation of section 2031-A of the Education Law and he distributed election materials within 100 feet of the entrance of the place of election. Hearings were started on this case and were ongoing at the time that this lawsuit was begun. And those hearings themselves had imposed a chilling effect on the First Amendment rights of the teacher plaintiff here and violated his First Amendment rights.

The pamphlet which he was distributing is in evidence, and it's been marked Exhibit C. The content of it is highly critical and really rather frivolous in a way, but it makes charges that the election is unjust and it denies democratic process because three of the five candidates are running for a single position and two of the candidates are unopposed. So it urges that they vote "no" for the unopposed, unjust candidates, which is a rather foolish thing to ask anyone to do because it's of no consequence.

On the other hand, this is clearly political expression which a person has a right to do and by becoming a teacher a citizen does not lose his First Amendment rights after hours. And on the hours of this election, at the time that these violations occurred, Mr. Cullen was not teaching, and he was off duty under his labo

contract as is stipulated in the facts herein and which the Court finds. It is absolutely clear and conceded that the Tuxedo school officials and the inspectors of election, whoever they were, were not in compliance with section 2031-A, since no distance markers had been used or posted, and the method of enforcing that law, if that's what they were trying to do here, was not the least restrictive means, because the Court finds that in the absence of a posted sign the statute cannot be enforced and the Court is convinced that no disciplinary charges would have been brought except for the content of the pamphlet, since it's clear without a posting there was no violation.

Therefore, the Court finds the disciplinary charges were brought in bad faith and maintained and continued in bad faith and constitute an ongoing violation of the plaintiff's First Amendment rights to be free in his speech and not to be harassed or prosecuted in any way for his expressions or based on the content of his expressions since he could not be found to have violated the law because there were no markers there.

The Court finds even if they tell him a hundred times over that he's within the prohibited distance they are disabled from enforcing the law unless the inspectors of election post notices or make a good-faith effort to post them. It may be in the hypothetical, the electioning people tore down the posters, that might be compliance to somebody who knew he was violating. In this case there was no such evidence.

The Court also perceives an unequal denial of equal protection of the laws because it's quite apparent in a contested election there may have been other people standing within the 100 feet distance and speaking with each other or greeting each other or making comments and these defendants made no effort whatever to police the area or send an agent out there to remain throughout the voting period or see whether other people were possibly electioneering. And the Court believes that this entire factual situation and the inferences which this Court has drawn from the stipulated facts require that a permanent injunction be issued granting the relief requested. It has been stipulated no monetary damages are sought.

The Court also finds as part of its analysis, and this fact, that the method of enforcement by ordering one person to remove himself from the prohibited area is not an adequate method of enforcement and it's not the least restrictive means of infringing on the vital fundamental right of free speech, and the proper and indeed the only way that this can be accomplished is to post the signs.

Apparently, everyone agrees that if this rather juvenile pamphlet had been handed out by this school teacher 101 feet from the door, they would have to lump it and like it, and there's nothing they can do the about it because he's off duty and he has the citizen right to claim the election is unjust and people should vote "no" for unopposed, unjust candidates for whatever good that would do.

There's no compelling state interest being served by what was done here and the *Burson* case is clearly distinguishable. It would be perfectly proper if they had posted the content neutral regulation as required by the statute and made it applicable to everybody and had someone there all day to enforce it as to everybody. That's a narrowly tailored governmental regulation of speech which is content neutral and is the least intrusive means. But this present means of enforcement was strictly *ad hominum* against this particular person. And while the Court could understand why the defendants might be a little bit angry with him over his conduct, they were absolutely unjustified in doing what they did.

The Court also notes that enforcement of crimes against the franchise are generally the obligation of the penal authorities who took no interest whatever in this matter. Although the police had been called to the area, no arrests were made by the police, and the District Attorney undertook no enforcement of any of the penal law provisions for crimes against the franchise and it's obvious he didn't because of the fact the 100-foot markers were not posted so there was no crime.

And, in a sense, the school district self-appointed itself to enforce whatever there is to be enforced knowing full well that they hadn't posted it. So, the means of enforcement, as I said earlier, employed in this case, cannot withstand strict scrutiny, because they're not narrowly tailored or content neutral and the statute has

provided as a condition preceded to liability that the posted signs have to be there.

In the *Burson* case the Supreme Court recognizes that public interests are served by a campaign-free zone. But the campaign-free zone is established by state law, and that means you have to mark it, and its purpose is to protect all the voters from confusion or undue influence and preserve the integrity the process.

As I noted earlier, he could have done what he did 101 feet away and there would have been no violation.

And the Court believes that it is improper and unconstitutional for this body to ignore the specific requirements of section 2031-A and then proceed to try to enforce the prohibition intended in that statute within their own unauthorized personal discretion by bringing a disciplinary proceeding based solely on oral information given to him that he was in an improper place. And in doing that, the school officials undermined the interests served by the objective use of markers which are narrowly tailored and less inclusive and content neutral.

And accordingly, the Court finds a violation of the First Amendment rights of the plaintiff which was a continuing one until the preliminary order to show cause was issued by this Court.

As I noted earlier, there are no damages. The plaintiff is entitled to a final judgment to be entered here which shall grant a permanent injunction against the defendants and each of them from pursuing in any way any disciplinary hearing whatsoever arising in any manner directly or indirectly out of the events of May 6 1992, and shall have his costs to be taxed and a reasonable attorney's fee.

And the Court will withhold the actual entry of the judgment until such time as the computation of the fee can be presented by affidavit and a reasonable opportunity to reply. You can agree on dates for that, if you will.

The Court places no emphasis on whether or not he knew what he was doing was illegal. Essentially, the Court believes it was not illegal unless they posted it.

Those are my findings and conclusions. Is there some other matter which the Court has failed to touch upon which either of you need to make a full record here?

Begin with you, Mr. Isseks.

MR. ISSEKS: No, there is not, your Honor.

THE COURT: All right.

MR. RUSHFIELD: No, your Honor.

* * *

THE COURT: And the Court continues the preliminary restraining order which was heretofore issued and served and which has been kept active until today by agreement of counsel is extended to and including such date as the Court signs the final judgment.

All right, thank you very much.

MR. RUSHFIELD: Thank you, your Honor.

MR. ISSEKS: Thank you.

(Whereupon, at 1:50 o'clock p.m., the proceedings were concluded.)

APPENDIX B (cont'd)

Stipulated Statement of Facts by Counsel and Order of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiff,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

STIPULATED STATEMENT OF FACTS BY COUNSEL AND ORDER

93 Civ. 2569 (CLB)

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiff and the defendants that the following is deemed to set forth all the relevant facts for the Court's determination of plaintiff's action for an injunction under Rule 65, FRCP, on the consolidated hearing on the plaintiff's preliminary and permanent injunction application:

1. Plaintiff Brian Cullen is an individual residing in the Town of Tuxedo, County of Orange, State of New York, and is a tenured high school science teacher employed by the defendant Tuxedo Union Free School District.

2. Defendant Dr. Herbert Fliegner is, and at all times relevant was, the Superintendent of the Tuxedo Union Free School District, Tuxedo, New York.

3. Defendants Joseph Ribando, Robert Quinn, Keld Alstrup, Bernard Modder, Constance Jones Phelps, and Michael Santoianni are, and/or at all times relevant were, members of the Board of Education of the Tuxedo Union Free School District, Tuxedo, New York.

4. Defendant Tuxedo Union Free School District is, and at all times relevant was, a public school district located in the County of Orange, State of New York.

5. Plaintiff has been a full-time teacher in the Tuxedo Union Free School District for eighteen consecutive years.

6. On February 15, 1990, the Tuxedo Union Free School District filed charges against plaintiff pursuant to New York State Education Law § 3020-a alleging that (1) during a weekend, in violation of previous directives, plaintiff took a group of students on an unauthorized field trip in an aircraft to conduct a scientific experiment and (2) plaintiff encouraged students to expose themselves in one of his classes. These were the first § 3020-a disciplinary charges ever filed against plaintiff. Pursuant to § 3020-a 1., after a hearing before a three-member panel constituted pursuant to § 3020-a 3.c., plaintiff was found guilty of the first charge and was fined $1,250. The second charge was dismissed. Neither plaintiff nor the defendant School District filed any appeal of the panel's decision or penalty.

7. On February 13, 1992, the Tuxedo Union Free School District filed charges against plaintiff pursuant to New York State Education Law § 3020-a, alleging that (1) plaintiff ignited the aerosol spray of a Binaca Breath Spray in the presence of elementary grade school students of the High School in the school cafeteria during lunchtime when he was serving as a cafeteria lunch supervisor (2) that such conduct amounted to insubordination in that plaintiff had received a prior directive not to engage in such conduct. Pursuant to § 3020-a, a three-member panel constituted pursuant to § 3020-a 3.c. found plaintiff guilty of both charges. The

panel's decision as to guilt was announced on or about September 1, 1992. By written decision of the panel dated October 26, 1992, the panel decided that plaintiff was to receive a penalty of four months' suspension without pay. The defendant School District filed an appeal of the panel's penalty decision and such appeal is pending before the New York State Commissioner of Education.

8. The Tuxedo Union Free School District Teacher Handbook provides concerning "Public Conduct on School Property," in part, as follows:

> The Board of Education prohibits the following conduct or acts on school property by students, teachers, staff members, licensees, or invitees:
>
> (9) The violation of any federal or state statute, local ordinance, or board policy.
>
> (10) The refusal or failure of any person to comply with a lawful order or direction of an official of the school district in the performance of his duties.

9. On May 6, 1992, an election of candidates for the Board of Education of the Tuxedo Union Free School District and on the annual School District budget was held at the location of the George F. Baker High School. The elections were being conducted in the High School library which is in the basement of the High School.

10. The George F. Baker High School is on Tuxedo Union Free School District property. The front of the High School has a walkway, below which are steps leading to a concrete apron which itself leads to Tornado Drive. Across Tornado Drive is a High School parking lot which itself borders a lawn. The walkway, steps, concrete apron, parking lot and lawn are all School District property. Tornado Drive intersects with School House Road (to the left when facing out to Tornado Drive from the front entrance of the High School) and Hillside Avenue (to the right when facing out from Tornado Drive from the front entrance of the High School). Tornado Drive, School House Road and Hillside Avenue are all public roads and are not School District Property.

11. A drawing of the George F. Baker High School and the grounds surrounding it, including Tornado Drive, the parking lot across Tornado Drive and School House Road, which was annexed to the Complaint as Exhibit C is stipulated to by the parties as being an accurate representation of the High School and immediately surrounding area. The scale of the drawing is one inch equals forty feet.

12. At the time of the May 6, 1992 election, no distance markers were placed at a distance of 100 feet (or any other distance) from the High School. The School District was not in possession of such distance markers.

13. Prior to the May 6, 1992 election, the Tuxedo Union Free School District had approximately ten elections during the preceding nine years. The School District was neither in possession of nor placed distance markers during any of those elections.

14. During the morning of May 6, 1993, in response to an inquiry about the legality of electioneering and the distance from the polls if somebody wished to electioneer, Tuxedo Union Free School District Superintendent of School Herbert R. Fliegner looked up the issue in the 1990 Handbook, for New School Board Members, also known as the "Hagony [sic] handbook." The Handbook provides in this regard that electioneering is prohibited within "100 feet of the polling place in school district elections, including a prohibition against distribution or display of a candidate's election campaign materials." It is silent concerning the placement of distance markers.

15. Pursuant to the collective bargaining agreement concerning teachers, the teacher's work day ends at 2:56 p.m. At about 3:30 p.m. on May 6, 1992, plaintiff approached the High School, placed himself on the front steps of the High School approximately 41 feet from the entrance door to the High School and commenced handing out copies of a flier protesting the election. A copy of the flier is annexed to the Complaint as Exhibit B thereto and is stipulated to by the parties as being an accurate representation of the flier.

16. At about 3:30 p.m. on May 6, 1993, a member of the School District staff advised Superintendent Fliegner that plaintiff was distributing leaflets on the front steps of the High School. Superintendent Fliegner thereupon exited through the front door of the High School and approached the plaintiff who was distributing the leaflets at or about the bottom step of the High School steps.

17. At or about 3:35 p.m. on May 6, 1993, Superintendent Fliegner told the plaintiff that he was directing the plaintiff to move away from the steps of the High School; that the election law provides that you must be at least 100 feet away from the entrance of the High School if you want to be doing any electioneering. The plaintiff responded to Superintendent Fliegner that he would not remove himself from the location at the foot of the steps of the High School, that Superintendent Fliegner could not tell him to do anything as it was after school hours, that he had a right to be there, that he was not doing anything wrong and that he would not move unless instructed by the police to do so. Superintendent Fliegner reiterated his demand that the plaintiff remove himself from handing out the fliers at the foot of the steps and plaintiff again refused. Superintendent Fliegner thereupon went to his office and called Theodore d'Allesandro, Chief of the Town of Tuxedo Police Department, and requested him to send a police unit over to instruct the plaintiff to remove himself to an appropriate distance from the polling place. Chief d'Allesandro advised he would call back.

18. At about 3:40 p.m., while Superintendent Fliegner was in his office, plaintiff was observed handing out the fliers by Joseph Zanetti, the Business Administrator for the Tuxedo Union Free School District. Mr. Zanetti is one of the two central office administrators in the School District, supervises teachers and stands in for the Superintendent of the School District in running the School District in the Superintendent's absence.

19. Upon observing the plaintiff handing out the fliers, Mr. Zanetti went down the stairs and approached the plaintiff who was on the concrete apron at the bottom of the stairs. Mr. Zanetti advised the plaintiff that what he was doing was illegal, that plaintiff was not outside the required statute distance and that

plaintiff must cease and remove himself. Mr. Zanetti told the plaintiff he was directing him to do that. The plaintiff responded to Mr. Zanetti with words to the effect of "What law? What statute? You're making the rules up as you go along. I am not going unless the police remove me." Mr. Zanetti remained as the plaintiff continued to hand out the fliers.

20. After his conversation with Chief d'Allesandro, Superintendent Fliegner returned to the front of the High School at about 3:40 p.m., requested Mr. Zanetti to remain as his witness, and in Mr. Zanetti's presence directed plaintiff to remove himself to a hundred feet from the front door of the High School. Plaintiff again refused, repeated that Superintendent Fliegner could not tell him to do anything and further repeated that if the police told him to move, he would do so. Mr. Zanetti then asked the plaintiff if he understood what Superintendent Fliegner was directing the plaintiff to do and plaintiff responded, "Yes." Plaintiff remained at or about the foot of the steps of the High School.

21. Following his second conversation with plaintiff in which he directed him to remove his leafletting activity beyond 100 feet from the High School, Superintendent Fliegner returned to his office and received a phone call from Chief d'Allesandro. Chief d'Allesandro advised Superintendent Fliegner that he had double checked with the Commissioner of Elections, Shirley Jensen, in Goshen, New York and that he would be sending a unit over immediately to move the plaintiff away from the High School steps.

22. Also following Superintendent Fliegner's second directive to the plaintiff, Mr. Zanetti went back into the High School and telephoned the Orange County Commissioner of Elections, Shirley Jensen. Mr. Zanetti identified himself as the Business Administrator for the Tuxedo School District, advised her of a problem with a resident concerning the conduct of the school election and asked her to confirm the distance of permitted electioneering. Ms. Jensen told Mr. Zanetti that electioneering was prohibited within 100 feet of the front door of the polling place. Ms. Jensen also informed Mr. Zanetti of the provision of the Election Law providing for the placement of distance markers.

23. The Tuxedo Police Department dispatched Tuxedo Police Officer John J. Kelly to the High School where he was advised the plaintiff was passing out leaflets in front of the school. Officer Kelly first stopped at the station to check out the statute as to the distance that plaintiff was required to be away from the polling place and discovered it was 100 feet; he thereupon went to the High School.

24. Police Officer Kelly found the plaintiff on the paved portion of Tornado Drive immediately before the curb leading to the concrete apron in front of the stairs to the High School. The plaintiff was handing out the fliers and admitted this to Police Officer Kelly. Police Officer Kelly thereupon advised the plaintiff that under the election law, he could not pass out the fliers where he was and indicated to the plaintiff that he was not 100 feet from the polling place. The plaintiff indicated to Officer Kelly that he was not aware of the election law and that he would move over to the public road on School House Lane. Officer Kelly indicated to the plaintiff that if he went to the intersection of Tornado Drive and School House Lane, he would be well outside the 100 feet.

25. Officer Kelly walked with the plaintiff to the intersection of School House Lane and Tornado Drive and remained there as Officer Kelly left the scene.

26. While Officer Kelly was escorting the plaintiff to the intersection of School House Lane and Tornado Drive, Mr. Zanetti informed Superintendent Fliegner of his conversation with Commissioner of Elections Jensen. Superintendent Fliegner spoke to the High School custodians to discover whether there were any distance markers available and was told that there were none.

27. Superintendent Fliegner thereafter observed the plaintiff at the intersection of Tornado Drive and School House Lane for approximately 15 or 20 minutes until at least at or about 4:15 p.m., when Superintendent Fliegner departed the premises.

28. Prior to departing the premises, after the plaintiff had removed himself to Tornado Drive and School House Lane, Superintendent Fliegner spoke with the Tuxedo School District District Clerk, Nancy Bourke, at about 4:00 p.m.; at which time he

told Ms. Bourke that he was leaving and would return later in the evening; that there had been some trouble with the plaintiff with some electioneering and that if Ms. Bourke had any problems, she was to call the police to come.

29. At about 4:30 p.m., Ms. Bourke went to the main floor of the High School by the front entrance doors to inspect the area and witnessed the plaintiff standing in the middle of the parking lot in the front of the school with his fliers. Ms. Bourke then witnessed the plaintiff approach the automobile of a Ms. Donna Vaught as it proceeded to park in the area immediately to the right of the bottom of the steps on Tornado Drive in front of the school approximately 70 feet from the entrance to the High School and hand Ms. Vaught one of his fliers. Ms. Bourke thereupon called the dispatcher at the Tuxedo Police Department to report that the plaintiff was electioneering in front of the High School and was advised that a police officer would be sent over.

30. Prior to the arrival of the police officer, the plaintiff and Ms. Bourke engaged in a conversation in the High School hallway during which Ms. Bourke advised him that he could not hand out his fliers either there or on the front steps and that he had to be at least 100 feet away.

31. When Police Officer Gannon arrived, he spoke with the plaintiff in the High School and advised him that the doorways to the High School were the entrance to the polling place. Officer Gannon gave the plaintiff a copy of New York State Election Law § 8-104 which sets forth a prohibition of 100 feet radial measured from the entrances to a polling place for electioneering. The plaintiff agreed with Officer Gannon that the 100 foot prohibition extended from the High School entrances. Officer Gannon then escorted the plaintiff outside of the High School building to the intersection of Hillside Avenue and Tornado Drive. The plaintiff thereupon asked Officer Gannon if that location was acceptable. Both the plaintiff and Officer Gannon agreed that this location was at least 100 feet from the entrances to the High School and Officer Gannon said the location was fine.

32. Superintendent Fliegner returned to the High School at about 8:30 p.m. Shortly after 8:30 p.m., while Superintendent

Fliegner and others were congregating in the High School library waiting for the polls to close in the company of several members of the School Board and others, one or more voters walked into the library holding up copies of the plaintiff's flier and said that one of the teachers was outside handing out these fliers in front of the steps of the High School. Several Board members, *i.e.*, Board President Ribando, Board Vice President Quinn, Board member Houston, Mr. Zanetti, Ms. Bourke and Superintendent Fliegner thereupon went outside between 8:40 and 8:45 p.m. where the plaintiff was discovered out on the concrete apron in front of the front steps of the High School. Superintendent Fliegner and Board President Ribando advised the plaintiff that he was violating the election laws and asked him to move from the area. The plaintiff did not so move and Ms. Bourke returned to the High School building to again summon the police.

33. Around 8:50 p.m., Mr. Zanetti returned to the high School and observed the plaintiff between that time and 9:00 p.m. on the concrete apron at the foot of the front steps of the High School in possession of the fliers he had been handing out. Mr. Zanetti thereupon walked out to the plaintiff on the concrete apron at the foot of the steps and told him that what he was doing was illegal and directed him to leave. The plaintiff thereupon responded that he was beyond the hundred-foot radius. Mr. Zanetti thereupon responded to the plaintiff that he would "never learn."

34. Superintendent Fliegner and District Clerk Bourke each are responsible for the conduct of the election of May 6, 1992.

35. No written notice was posted during the May 6 election advising of the prohibition on election activity within 100 feet of the polling place.

36. No one physically measured the distance of 100 feet from the school entrance on or before May 6, 1992. No one pointed out to plaintiff on May 6, 1992 specifically where 100 feet from the school entrance was.

37. Section 3020-a 1. permits charges to be filed against a teacher only during the period between the actual opening and closing of the school year for which a teacher is normally required

to serve. The 1991-1992 school year during which the May 6, 1992 election occurred closed on June 26 1992. No charges against the plaintiff were filed before the end of the school year.

38. On September 1, 1992, at 1:40 p.m., Superintendent Fliegner telephoned the plaintiff and asked whether the plaintiff could meet with Superintendent Fliegner that day for a meeting the Superintendent had requested. The plaintiff was unable to attend such a meeting. During this telephone conversation, Superintendent Fliegner advised the plaintiff that he would be reviewing certain matters with the Board of Education, including the events of May 6, 1992.

39. On September 3, 1992, immediately following the actual opening of the 1992-1993 school year, Superintendent Fliegner preferred three formal charges against the plaintiff concerning the events of May 6, 1992. A copy of those charges and the finding of probable cause by the Board of Education are annexed to the Complaint herein as Exhibit A. At the time the charges were presented to the Board of Education, it was informed by its attorney that no distance markers had been placed at the High School on May 6, 1992. All three charges were unanimously held to be for probable cause by all six members of the Board of Education, including Board members Robert Quinn and Michael Santoianni who were running unopposed in the May 6, 1992 election and who were named in the plaintiff's flier handed out during that election.

40. During each incident forming the basis of the charges, the plaintiff was situated within 100 feet of the front doors of the High School.

41. Pursuant to Education Law § 3020-a, a hearing on the three charges was commenced before a three member panel constituted pursuant to § 3020-a 3.c. on February 26, 1993, at which time the District presented its case in full. A transcript of the hearing is annexed as Exhibit A to the Affidavit of David S. Shaw and the parties stipulate and agree that said transcript represents an accurate and complete portrayal of the testimony and statements made on the record at that hearing.

42. At the conclusion of the presentation of the School District's case, over the objection of counsel for the School District, the plaintiff's counsel stated that he had a right to seek a preliminary injunction staying the hearings on the basis that a constitutional First Amendment issue was involved, but would instead submit this constitutional claim to the Section 3020-a panel and have that panel decide it on a motion to dismiss the charges against the plaintiff. Thereupon, counsel for both parties stipulated on the record to the entire Section 3020-a panel hearing the plaintiff's motion to dismiss with the subject matter of that motion being limited to the "question of the denial of the constitutional rights by the complainant district with respect to the complaint, to the charges against him."

43. Both parties briefed the constitutional First Amendment issue to the Section 3020-a panel. Thereafter, on April 16, 1993, plaintiff's counsel was advised by telephone by the Chairman of the panel that the plaintiff's motion to dismiss was denied by a vote of 2 to 1.

44. By Order to Show Cause of this Court dated April 20, 1993, plaintiff commenced the instant action.

45. On April 22, 1993, the Section 3020-a panel rendered its decision, a copy of which is annexed to the Affidavit of David S. Shaw as Exhibit B. The panel specifically found that the placement of distance markers, as required by Education Law § 2031-a1. was not a condition precedent to application of the electioneering provision under § 2031-a2. and further found that "it is clear from the testimony of the hearing that when [the plaintiff] was directed to move and refused to do so, he was clearly within 100 feet of the polling place."

46. The panel further found that "the directives in this case to [the plaintiff] and the facts as evidenced at the hearing do not bring into question any violation of [the plaintiff's] constitutional rights." The panel thereupon denied the plaintiff's motion to dismiss the Section 3020-a, Education Law charges and determined that

there was no First Amendment barrier against proceeding to a determination on the merits.

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By /s/
Robert N. Isseks
(RNI 0241)

The foregoing facts are found, modified by the oral stipulation of counsel this date and this Court's oral decision

SO ORDERED

May 28, 1993

/s/ Charles L. Brieant
USDJ

APPENDIX C

Memorandum and Order of the U.S. District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN,

Plaintiff,

— against —

DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT,

Defendants.

MEMORANDUM & ORDER

93 Civ. 2569 (CLB)

Brieant, J.

On May 28, 1993, after a trial on stipulated facts, this Court held that the defendants violated plaintiff Brian Cullen's right to free speech as guaranteed by the First Amendment when they commenced a disciplinary proceeding against Mr. Cullen pursuant to Section 3020-a of New York's Education Law proceeding. *See* May 28, 1993 Trial Transcript. Entry of a Final Judgment has been withheld pending this Court's determination on plaintiff's fee application.

Plaintiff now seeks a determination of the amount of attorneys fees and costs recoverable in this action. On June 11, 1993, counsel submitted an affidavit in support of the application requesting $18,900 in attorneys fees and $182.65 in disbursements for a total amount of $19,082.65.

Defendants concede that plaintiff is entitled to recover his attorneys fees under Section 1988, but oppose the application on the grounds that (1) the application does not contain detailed contemporaneous time records; (2) the application includes time charges for legal work done in preparing for the administrative hearing, as well as for counsel's attendance at the hearing; (3) the application includes excessive, duplicative and otherwise unnecessary hours; and (4) the hourly fees requested are excessive. *See* Court Doc. No. 15.

Plaintiff's fee application includes a request for 19 hours of legal services rendered by Robert N. Isseks, Esq. at an hourly rate of $200/hour and for 7 hours of legal services rendered by Alex Smith, Esq. at an hourly rate of $150 for investigating and preparing for the Section 3020-a panel hearings, attendance at the hearings and preparing the memorandum of law submitted to the Section 3020-a panel. Defendants contend that plaintiff should not be reimbursed for any work done in connection with the 3020-a administrative proceeding.

The Court disagrees. Most, if not all, of the work which was performed in connection with plaintiff's defense of the 3020-a proceeding would have been necessary to prove plaintiff's First Amendment claim in this Court. Indeed, the stipulated facts were gleaned from the testimony taken at the administrative hearing and the transcript of that proceeding was made part of this Court's trial record. The Court finds that plaintiff reduced the overall cost of litigating in this Court by relying upon the work performed in connection with the administrative proceeding and thereby, avoided the expense of discovery, depositions and trial time.

Moreover, the Court notes that counsel for plaintiff has not included in the fee application any time spent on "ministerial legal services that were specifically connected with the 3020-a proceeding and cannot be construed as preparation for this action, such as correspondence and communications with the State Education Department in selecting the hearing panel members, correspondence and communications with the panel chairman and the District's counsel in scheduling and rescheduling the hearing and preparation and serving of subpoenas on witnesses. . . ." Court Doc. No. 14,

Isseks Aff., ¶ 4. Therefore, the Court concludes that plaintiff's request for reimbursement for some of the work done in connection with the 3020-a administrative proceeding is appropriate in this case. *See North Carolina Department of Transportation v. Crest Street Community Council,* 479 U.S. 6. 15 (1986) (Discrete portion of the work product from the administrative proceeding that was useful and of a type necessary to advance the civil rights litigation, may be part of an award of attorney fees under Section 1988).

The fee application submitted by counsel for the plaintiff can only be characterized as reasonable. In making this determination, the Court finds that the contemporaneous time records submitted by counsel are sufficiently detailed to permit an award of attorney's fees in this case. *See Lewis v. Coughlin,* 698 F.2d 112, 128 (2d Cir. 1983); *New York Association for Retarded Children v. Carey,* 711 F.2d 1136, 1147, 1148 (2d Cir. 1983) (contemporaneous time records "should specify, for each attorney, the date, the hours expended, and the nature of the work done."). *See also* Isseks June 17, 1993 Aff., ¶¶ 2-4. The Court also notes that time spent preparing a fee application is compensable in this Circuit. *See Gagne v. Maher,* 594 F.2d 336, 343-45 (2d Cir. 1979), *aff'd on other grounds,* 448 U.S. 122 (1980); *New York Association for Retarded Children v. Carey,* 711 F.2d at 1148 (2d Cir. 1983).

The Court rejects defendants' suggestion that the fee should be reduced merely because the defendant is a school district, whose funds are public monies raised through local taxes. The School Board Members, who are the elected representatives of those same local taxpayers, vigorously opposed Mr. Cullen's claim despite its obvious merit and his modest settlement demand. Public policy compels this Court to award plaintiff's counsel such sum as will fairly and reasonably compensate counsel for the actual and necessary legal services rendered in vindicating Mr. Cullen's constitutional rights without regard to whether a defendant is a school district or not.

The Court finds that the hourly rates requested by plaintiff's counsel are fair and reasonable, as well as consistent with the prevailing rates in the legal community for similar work performed by attorneys of comparable experience and qualifications. *See*

Capwell v. Morales, 89 Civ. 6797 (CLB) (November 30, 1990 Memorandum & Order).

Finally, defendants argue that plaintiff is not entitled to recovery for the time expended by Mr. Smith appearing in Court since he "simply sat moot (sic)." *See* Court Doc. No. 15, Rushfield Aff., ¶ 11. The Court commends Mr. Smith for remaining mute, and knowing when to say nothing.

It is entirely reasonable for two attorneys to represent one plaintiff and the fact that attorney Smith said nothing on the record in Court does not mean that he did not otherwise provide valuable assistance to co-counsel in achieving an excellent result for their client. The law firm representing defendants also had two attorneys present in Court on May 14, 1993 and again on May 28, 1993. *DiFlippo v. Morizio,* 759 F.2d 231, 235 (2d Cir. 1985) ("[T]he reasonableness of the time expended must be judged by standards of the private bar."). Surely, the standard of reasonableness for plaintiff cannot be different than that for defendants.

While some of the "non-attorney tasks" performed by attorneys Isseks and Smith arguably could have been performed by someone other than the attorneys themselves, it is not unusual for attorneys in small offices to perform these tasks. In any event, the Court finds that a uniform rate of compensation is appropriate in this case. *Cf. Cohen v. West Haven Board of Police Commissioners,* 638 F.2d 496, 505 (2d Cir. 1980) ("a different rate of compensation may well be set for different types of litigation tasks.").

Based on the foregoing, plaintiff is awarded $18,900 in attorney fees and $182.65 in costs and disbursements, for a total award of $ 19,082.65.

The Court has signed a Final Judgement this date.

SO ORDERED.

Dated: White Plains, New York
June 21, 1993

/s/ Charles L. Brieant
Charles L. Brieant
USDJ

APPENDIX D

Finding in Education Proceeding #2598, Pursuant to New York Education Law § 3020-a, on Respondent's Motion to Dismiss

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
DIVISION OF EMPLOYER-EMPLOYEE RELATIONS

In the Matter of the

TUXEDO UNION FREE SCHOOL DISTRICT,

Complainant

vs.

BRIAN CULLEN,

Respondent-Tenured Teacher

Pursuant to Section 3020-a Education Law, Educational Proceeding (File #2598)

FINDING ON RESPONDENT'S MOTION TO DISMISS

Panel Members

James A. Cashen, Esq., Chairperson
Harvey Hillburgh, Board Panel Member
Robert Keenan, Employee Panel Member

APPEARANCES

District

Shaw & Silvera
by David Shaw, Esq. of Counsel and
Jay M. Siegel, Esq. of Counsel

Teacher

Robert N. Isseks, Esq. and
Alex Smith, Esq.

The hearing on this matter was held on February 26, 1993 commencing at 10:45 a.m. At the end of the hearing that day, attorneys for Respondent, Brian Cullen, moved to dismiss the charges on the ground that the proposed discipline of Respondent violated Respondent's rights under the First Amendment of the United State Constitution. The parties stipulated to authorize the Section 3020-a Education Law Panel to determine the motion to dismiss the case on the Constitutional grounds.

BACKGROUND

The Respondent contends that his First Amendment right of free speech was violated in the failure of the District to place distance markers, as required under Section 2031-a(1) of the State Education Law, indicating a 100 foot restricted zone from electioneering.

Testimony at the hearing was that, in fact, no distance markers were provided at the polling place on May 22, 1992, the day of the Board election and the Budget vote. Testimony also indicated that Respondent, Brian Cullen, handed out fliers to voters who came near to the polling place. The handing out of such fliers was contrary to an order of a police officer directing Mr. Cullen to move his electioneering beyond 100 feet from the polling place. The District Superintendent, the Business Manager and the Clerk of the Board of Education all directed Respondent to move his electioneering beyond the 100 foot boundary after the order of the police officer had been given. All three persons told Brian that the handouts were occurring within the 100 foot restricted zone provided for under Section 2031-a of the State Education Law.

The testimony of Patrolman John Kelly of the Village of Tuxedo Police Department was that he walked Respondent to a point clearly beyond 100 feet from the polling place and told Respondent to remain in that area in handing out the fliers. According to the record, Respondent agreed to do so.

FINDING

The Chairperson of the Panel and Mr. Hillburgh find that the action of the Tuxedo Union Free School District in charging Brian Cullen under Section 3020-a of the Education Law for

handing out fliers near the School District polling place, in defiance of directives to him from District and Board of Education representatives not to do so, did not restrict Mr. Cullen's right of free speech under the First Amendment.

In this connection, we cite the case of *Burson v. Freeman,* 504 U.S. ____, 112 S.C. 1846, 119 L.Ed 2nd 5. In this case, the United States Supreme Court in 1992 ruled that a provision in the Tennessee Election Code which prohibited electioneering within 100 feet from polling place entrances did not violate a citizen's First Amendment right of free speech.

While Respondent attempted to distinguish that case from the present one on several points, including especially the fact that in Section 2031-a(1) of the State Education Law, unlike the Tennessee Election Code, provided for the placement of distance markers at the 100 foot restricted zone boundary. We agree, however, with the District in its contention that the failure of the District to provide such markers did not create a situation which would bring into application the First Amendment. See *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 92 L.Ed.2d 549, (1986) and *Frasca v. Andrews,* 463 F. Supp. 1043 (EDNY 1979).

We also find that the placement of distance markers, as required by Section 2031-a(1) was not a condition precedent to application of the electioneering prohibition under Section 2031-a(2) of the Education Law as contended by the Respondent. In addition, it is clear from the testimony at the hearing that when the Respondent was directed to move and refused to do so he was clearly within 100 feet of the polling place.

Finally, we find the directives in this case to Respondent and the facts as evidenced at the hearing do not bring into question any violation of Respondent's constitutional rights. That is, the directives of the District and Board officials were not intended to, and did not in fact, prevent Respondent from expressing his opinion. See *Harris v. Mechanicville Central School District,* 45 N.Y. 2d 279 (1978).

CONCLUSION

We deny Respondent's motion to dismiss the Section 3020-a, Education Law charges and determine there is no First Amendment barrier against proceeding to a determination on the merits.

/s/
James A. Cashen, Esq.
Panel Chairperson

April 22, 1993

/s/
Harvey Hillburgh
Employer Panel Member

April 22, 1993

DISSENT

I dissent from the decision of Messrs. Cashen and Hillburgh. I would dismiss the charges against Respondent as the District failure to provide boundary markers as required by the Election Law resulted in the denial of Respondent's right of free speech in the least restrictive manner possible.

/s/
Robert Keenan
Employee Panel Member

April 22, 1993

APPENDIX E

Text of Statutes Involved

NEW YORK EDUCATION LAW

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of the receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a

hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of the panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three

members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be slected by the employing board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision, provided, however, that such district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.

NEW YORK EDUCATION LAW

§ 2031-a. Electioneering within one hundred feet of polling place prohibited; distance markers.

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the

polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of the election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

NEW YORK EDUCATION LAW

§ 2609. Conduct of election; challenges

4-a. (a) At each such election there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained in paragraph (b) of this subdivision and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

(b) Where such markers are so placed and the polls are open, no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this subdivision, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any proposition to be voted upon.

NEW YORK ELECTION LAW

§ 8—104. Polls

1. The American flag shall be kept displayed at each polling place throughout the election. Facsimile ballots and distance markers shall not be taken down, torn or defaced during the election. While the polls are open no person shall do any electioneering within the polling place, or in any public street, within a one hundred foot radial measured from the entrances designated by the inspectors of election, to such polling place or within such distance in any place in a public manner; and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. While the polls are open no person shall consume any alcoholic beverages within the polling place.

2. The boxes and all official ballots shall be kept within the guard-rail, and at least six feet therefrom, from the opening of the polls until the announcement of the result of the canvass and the signing of the inspectors' returns thereof. No person shall be admitted within the guard-rail during such period except the election officers, authorized watchers, persons admitted by the inspectors to preserve order or enforce the law, and voters duly admitted for the purpose of voting; provided, however, that candidates voted for at the polling place may be within the guard-rail during the canvass.

3. The provisions of this chapter concerning the preservation of order and apprehension for crime on a day of registration, shall apply to a day of election, but a person taken into custody shall not be prohibited thereby from voting.

4. After a ballot box shall have been locked for the purposes of election, it shall not be opened until it is opened at the close of the polls for purposes of canvass. Each inspector shall be responsible personally for the custody of each ballot box and its contents from the time the election begins until the box is delivered, according to law, to the person entitled to receive it.

5. Voters entitled to vote who are on line or in the polling place at the time fixed by law for the closing of the polls shall be allowed to vote.

6. In the city of New York, during days of primary, general, special and community school board elections, at each premises wherein a polling place or places are located, at least one police officer or peace officer designated by the police commissioner of such city pursuant to the provisions of article two of the criminal procedure law shall be assigned for duty from the opening until the closing of the polls. Additional police officers or peace officers may be assigned as is deemed appropriate by the police commissioner of such city.

APPENDIX F

Complaint, filed April 20, 1993, with Exhibits A, B and C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN, Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNI and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants.	COMPLAINT

I. PARTIES

1. Plaintiff, BRIAN CULLEN is an individual residing in the Town of Tuxedo, County of Orange, State of New York.

2. Defendant DR. HERBERT FLIEGNER is, and at all times relevant was, the Superintendent of the Tuxedo Union Free School District, Goshen, New York.

3. Defendants JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, and MICHAEL SANTOIANNI are, and/or at all times relevant were, members of the Board of Education of the Tuxedo Union Free School District, Tuxedo, New York (hereinafter referred to as the "Board member defendants").

4. Defendant TUXEDO UNION FREE SCHOOL DISTRICT is, and at all times relevant was, a public school district located in the County of Orange, State of New York.

II. JURISDICTION AND VENUE

5. This is a civil action authorized by 42 U.S.C. Sections 1983 and 1985 for compensatory and punitive damages and for injunctive and declaratory relief to redress the deprivation, under color of state law, of rights, privileges and immunities secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution. Jurisdiction is conferred by 28 U.S.C. Sections 1331, 1343 and 2201.

6. This action is properly filed in the United States District Court for the Southern District of New York, as authorized by 28 U.S.C. Section 1391, inasmuch as jurisdiction of this action is not founded on diversity of citizenship, each claim arose within the Southern District of New York, and plaintiff resides within the Southern District of New York.

III. STATEMENT OF FACTS

7. Plaintiff is a tenured high school science teacher, employed by the defendant Tuxedo Union Free School District (hereinafter referred to as "District").

8. Plaintiff has been a full-time teacher for the District for 18 consecutive years.

9. Throughout plaintiff's employment with the District plaintiff has competently performed his duties and has fulfilled his responsibilities as a secondary teacher, receiving only excellent observations of his teaching.

10. From the time plaintiff commenced his employment with the District he received no complaints regarding his fitness to teach and was never the subject of any disciplinary proceeding, until February 15, 1990, when the District filed charges against plaintiff pursuant to New York State Education Law Section 3020-a alleging that (1) during a weekend, plaintiff took a group of students on an unauthorized field trip in an aircraft to conduct a scientific experiment and (2) plaintiff encouraged students to expose

themselves in one of his classes. After a hearing before a three-member panel, plaintiff was found guilty of the first charge and a fine was imposed. The fine was imposed after the hearing panel noted that plaintiff was "a dedicated, competent and enthusiastic teacher . . . clearly a very fine teacher." The second charge was dismissed by the hearing panel as "trivial, inconsequential, of no significance."

11. On February 13, 1992, the District again filed Education Law 3020-a charges against plaintiff, this time alleging that (1) he conducted a dangerous scientific experiment in the school cafeteria during lunchtime and (2) that such conduct amounted to insubordination in that plaintiff had received a prior directive not to conduct such experiment. On or about September 1, 1992, at a hearing session scheduled for the sole purpose of the panel announcing its decision, the panel announced that it had found plaintiff guilty of both charges. (By written decision of the panel dated October 26, 1992, plaintiff received a penalty of 4 months suspension without pay.)

12. On September 3, 1992, three new Education Law 3020-a charges against plaintiff were preferred by defendant Fliegner and found, by vote of the Board member defendants in executive session to be supported by probable cause. These three charges read as follows:

> CHARGE I—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION
>
> In that on or about May 6, 1992, at approximately 4:30 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 p.m. on May 6, 1992, not to engage in illegal electioneering . . .

CHARGE II—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:30 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 p.m. on May 6, 1992, and Board of Education Clerk, Nancy Bourke, at 4:30 p.m., who was responsible for conducting the election, not to engage in illegal electioneering . . .

CHARGE III—MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:50 p.m., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of Section 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Business Administrator, Joseph Zanetti, not to engage in illegal electioneering . . .

13. New York State Education Law Section 2031-a is entitled "Electioneering within one hundred feet of polling place prohibited; distance markers," and provides, *en toto*:

1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a

distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.

2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

14. A hearing on the above charges was commenced before a three-member panel on February 26, 1993, at which time the District presented its case in full. The District's proof included the following.

15. Fliegner testified that he actually read Education Law 2031-a on the morning of May 6, 1992. Nevertheless, Fliegner admitted that he did nothing to insure the emplacement of the statutorily mandated markers at any of the entrances to the Tuxedo High School, the District's polling place. Despite Fliegner's concession that it was his responsibility and duty on May 6, 1992, to enforce the provisions of Education Law 2031-a, there is no dispute that no markers were ever placed at the entrance to the High School on that day. There is no dispute that no written notice was ever posted anywhere containing the prohibition set forth in Education Law 3021-a. There is also no dispute that no one on

behalf of the District ever measured the distance of 100 feet from the school entrance on or before May 6, 1992.

16. Fliegner testified that at about 3:30 on May 6, 1992, he was advised that plaintiff was distributing leaflets on the front steps of the High School. Fliegner went outside the school and confronted plaintiff near the bottom of the steps by telling plaintiff to remove himself from the steps to somewhere outside a 100-foot radius of the entrance of the high school.

17. Plaintiff was distributing his flier as a citizen of the Tuxedo Union Free School District Tuxedo Union Free School District, not as a teacher. Fliegner admitted during his testimony that when he saw plaintiff at 3:30, it was after school hours in that the teachers' contract provided that their work day ended before that time.

18. Fliegner testified that when he told plaintiff to remove himself, plaintiff refused to do so, saying words to the effect, "Where is the police? If the police tell me to move, I will. You can't tell me to do anything. This is after school hours. I have a right to be here and I'm not doing anything wrong." Fliegner reiterated his directive to plaintiff to remove himself and plaintiff continued to refuse.

19. Fliegner testified that he then called the police to instruct plaintiff to remove himself to the appropriate distance.

20. Fliegner testified that he then went out again and once more directed plaintiff to remove himself "to within a 100 feet radial distance from the high school front door". Again plaintiff refused and repeated in essence the same thing he had said before: "Where are the police? If the police tell me to go, I'll leave. You can't tell me to do anything."

21. Fliegner testified that plaintiff then said to him "You make up the rules as you go along. You use your position, your authority to get your way."

22. Fliegner testified that he went back into the school and shortly thereafter observed a police officer, Sgt. John Kelly, speak

to plaintiff and walk plaintiff to a different location near the corner of Tornado Drive and Schoolhouse Road.

23. Fliegner testified that he went home at 4:15 that afternoon and did not return until 8:30.

24. Fliegner testified that shortly after his return to the High School he again confronted plaintiff and told him to leave and plaintiff again refused.

25. Fliegner admitted that although inspectors of election were present at the polling place on May 6, 1992, he took no action to have them comply with Education Law Section 2031-a and instead simply advised them that plaintiff, in his opinion, was violating the law.

26. Fliegner admitted that his concern was not with the District's failure to place markers, as mandated by the statute he read that very morning, but only with plaintiff.

27. The flier that plaintiff was handing out on May 6, 1992, a copy of which is annexed hereto and made a part of this complaint, urged the electorate not to vote for defendants Quinn and Santoianni, two of Board member defendants who voted to bring the subject Education Law Section 3020-a charges against plaintiff.

28. The District's next witness at the hearing, the District Clerk, Nancy Bourke, testified that at about 4:30, she saw plaintiff standing by himself in the middle of the parking lot with the fliers in his hand and then handed a flier to a voter as that voter parked her car in the roadway in front of the school at the bottom of the steps.

29. Bourke testified that she called the police and reported that plaintiff was electioneering in front of the school.

30. Bourke testified that thereafter, in the school hallway, she said to plaintiff, "Brian, you can't hand out those papers here or on the front steps. You have to be at least a hundred feet away."

31. Bourke testified that at about 8:30, some more people walked into the library carrying plaintiff's fliers and Bourke went

outside with defendants Fliegner and Ribando and saw plaintiff and others standing on the curb area at the bottom of the steps.

32. The District's third witness, District Business Administrator, Joseph Zanetti, testified that he first observed plaintiff between 3:30 and 4:00 at the bottom of the front steps handing out the fliers, at which time Zanetti told plaintiff, "Brian, what you're doing is illegal. You are not outside the required statute distance . . . " without specifying what that distance was, and that he must cease and remove himself.

33. Zanetti testified that at that point plaintiff said, in effect, "Well, what law? What statute? You're making the rules up as you go along. I am not going unless the police remove me," or words to that effect.

34. Zanetti testified that plaintiff continued to hand out the flier on the concrete apron below the bottom step, and that he, Zanetti, told each voter who received a flier that what plaintiff was doing was in violation of the election laws and that he had been told to remove himself and didn't.

35. Zanetti testified that at approximately 4:00 he went home and did not return to the school until about 8:50, at which time he observed plaintiff again with his fliers on the concrete apron and he said to plaintiff, "Brian, what you are doing is illegal. I am directing you to leave." Zanetti testified that plaintiff responded, "I am beyond a hundred foot radius." Zanetti testified that he then said, "Brian, you'll never learn."

36. Zanetti testified that he never pointed out to plaintiff the area where he, Zanetti, thought 100 feet was. Zanetti testified that he "did not point to any place and say it was okay to electioneer."

37. The District's last witness, Police Officer Kelly, testified that around 3:30 he observed plaintiff passing out the fliers on the paved portion of Tornado Drive right in front of the steps, at which time he asked plaintiff, "Brian, what are you doing?" and plaintiff told Kelly he was handing out pamphlets. Kelly testified that he then advised plaintiff about the election law and the distance he should be away from the "polling grounds" and told plaintiff that he, Kelly, thought plaintiff would be well within the distance if he

either proceeded to the right, to Schoolhouse Road, or to the left, to Hillside Avenue.

38. Kelly testified that he believes he told plaintiff that he, plaintiff, had to be 100 feet from the polling place, not from the doors.

39. Kelly testified that he never told plaintiff where he thought a hundred feet from the entrance to the polling place was.

40. Kelly testified that plaintiff said he was not aware of the election law or that what he was doing was wrong and walked to the intersection of Schoolhouse Road and Tornado Drive, a location which, according to Kelly, exceeded a distance of 100 feet from the entrance to the school.

41. On September 1, 1992, just three hours after the previous three-member panel announced its decision on the aforementioned second set of 3020-a charges against plaintiff, Fliegner telephoned plaintiff and advised him that new 3020-a charges were going to be brought arising out of plaintiff's electioneering on May 6, 1992. Two days later, Fliegner preferred the instant 3020-a charges to the Board member defendants, four months from the date of the District's elections.

42. Fliegner testified at the hearing that before the Board member defendants voted to discipline plaintiff for purportedly violating Education Law Section 3021-a, they were advised by the attorney for the District that the District itself failed to emplace the mandated markers and notice.

IV. IRREPARABLE INJURY

43. By virtue of the foregoing, plaintiff has been and continues to be irreparably injured in that the defendants' conduct is interfering with plaintiff's participating in his chosen profession and is having a chilling affect upon his right to freedom of speech as guaranteed by the First Amendment to the United States Constitution.

44. Plaintiff will suffer further irreparable injury if defendants are permitted to continue their disciplinary proceeding against him, for such proceeding constitutes an ongoing

infringement upon plaintiff's right to freedom of speech in violation of the guarantees provided by the First Amendment to the United State Constitution.

45. At the conclusion of the District's presentation of its case at the hearing, plaintiff moved to dismiss the charges on the constitutional ground set forth in this complaint. The hearing was adjourned to April 22, 1993, for the receipt of memoranda from counsel and a decision on the motion by the panel. (The accompanying memorandum is essentially the same as the one submitted to the panel with some editorial revisions.)

46. On April 16, 1993, plaintiff's counsel was advised by telephone by the chairman of the panel that the motion was denied by a vote of 2 to 1. No written decision has been received to date.

V. CAUSE OF ACTION

47. The acts, conduct and behavior of the defendants, and each of them, acting individually and in concert with one another, were performed knowingly, maliciously, and in retaliation against plaintiff for his voicing his criticism of the May, 1992, District School Board candidates and of the way the District was conducting its election.

48. The subject Education Law Section 3020-a charges are pretextual and were brought in bad faith in that the District and the individual defendants have demonstrated their complete lack of concern for the fact that the District, through Fliegner, totally ignored the mandates of Education Law 3021-a as it applied to the District, and have chosen to enforce such mandates only to punish plaintiff.

49. The defendants are opportunistically using the District's own violation of Education Law Section 3021-a—its failure to measure and demarcate the 100 foot radius and to post proper notice on the markers of the prohibition contained in the statute—to punish plaintiff, a tenured teacher.

50. By virtue of the conduct herein alleged, defendants, acting individually and in concert, under color of state law, deprived, and are continuing to deprive, plaintiff of the rights,

privileges and immunities secured by the Constitution of the United States, specifically:

(a) The right of plaintiff to freedom of speech under the First Amendment;

(b) The right of plaintiff not to be deprived of liberty or property without procedural due process of law secured by the Fourteenth Amendment;

(c) The right of plaintiff to substantive due process of law secured by the Fourteenth Amendment;

(d) The right of plaintiff to the equal protection of the laws secured by the Fourteenth Amendment.

51. Plaintiff has been damaged as a result of the conduct complained of herein.

52. The acts, conduct and behavior of defendants in concert and individually were performed knowingly, intentionally, maliciously and in willful violation of the United States Constitution and Laws, entitling plaintiff to punitive damages.

WHEREFORE, Plaintiff asks this Court to:

A. Issue an order adjudging and declaring that the pending disciplinary proceedings commenced by the defendants against plaintiff are not authorized by statute, regulation or contract and violate plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution;

B. Issue a preliminary injunction ordering the defendants to refrain immediately and pending the final hearing and determination of this action from continuing with the pending disciplinary proceedings commenced against plaintiff;

C. Issue a permanent injunction perpetually enjoining and restraining defendants and all those in active concert or participation with them in the conduct complained of herein;

D. Award plaintiff compensatory damages in an amount to be determined by the Court;

D. Award plaintiff punitive damages in an amount to be determined by the Court;

E. Award plaintiff the costs and disbursements of this action;

F. Award plaintiff reasonable attorney fees; and

G. Grant plaintiff such further and other relief as to this Court may seem just and proper.

Dated: April 20, 1993

Respectfully submitted,

ROBERT N. ISSEKS, ESQ.
40 Park Place
P.O. Box 247
Goshen, New York 10924
(914) 294-9255/7292

/s/
ROBERT N. ISSEKS (RI 0241)

ALEX SMITH, ESQ.
41 Dolson Avenue
Middletown, New York 10940
(914) 343-2101

Form 3020-a-1

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Notice of Determination of Probable Cause on
Charges Brought Against Tenured School District Employee
Section 3020-a, Education Law

To: Mr. Brian Cullen
(name of tenured school district employee)

Address: Eagle Valley Road, Sloatsburg, New York 10974
(name and address of the tenured school district employee)

Please be advised that (board of education,
Tuxedo Union Free School District , Tuxedo Park, New York 10987
(legal title of district) *(address)*

meeting in executive session 9/3/92, has found that there is probably cause
(date)

for the following charge preferred against you by Dr. Herbert Fliegner:
(name of complainant)

(Please describe charge in detail)

CHARGE I — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 4:30 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of § 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of

Schools, Dr. Herbert Fliegner, at approximately 3:30 P.M. on May 6, 1992, not to engage in illegal electioneering.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:30 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering in violation of § 2031-a of the Education Law. Mr. Cullen engaged in such conduct after he knew he could not engage in electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Superintendent of Schools, Dr. Herbert Fliegner, at approximately 3:30 P.M. on May 6, 1992, and Board of Education Clerk, Nancy Bourke, at 4:30 P.M., who was responsible for conducting the election, not to engage in illegal electioneering.

Addendum to 1st page of Form 3020-a-1

CHARGE II — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER And/OR INSUBORDINATION (continued)

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE III — MISCONDUCT AND/OR CONDUCT UNBECOMING A TEACHER AND/OR INSUBORDINATION

In that on or about May 6, 1992, at approximately 8:50 P.M., Mr. Brian Cullen, a tenured teacher, engaged in illegal electioneering within 100 feet of the entrance door to the place of the election (Tuxedo High School). This conduct was undertaken after receiving a directive from Business Administrator, Joseph Zanetti, not to engage in illegal electioneering.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

Within ten days of receipt of these charges, you must elect to request a hearing before a three member panel, or waive your rights to such a hearing. Should you fail to so request or to waive within the specified ten days, the district clerk or the secretary of the board of education will notify both you and the Commission of Education that a waiver has been deemed to have occurred and that the board of education will meet to determine the case and fix the penalty or punishment, if one is to be imposed.

9/8/92
(Date of Notice)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

Nancy Bourke
(Please Type or Print Name)

Copy *must* be sent to:

Commissioner of Education
State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Attached is a copy of the Rights of Tenured Employees under Section 3020-a of the Education Law. A copy of this charge is being forwarded to the New York State Commissioner of Education, as required by law.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education:

This finding of probable cause as to the charge numbered I was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

NOTE: There should be a separate vote as to each charge.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education

This finding of probable cause as to the charge numbered II was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

NOTE: There should be a separate vote as to each charge.

Form 3020-a-1-B

(Attach to From 3020 a-1 for each charge)

The University of the State of New York
The State Education Department
School District Employer-Employee Relations Unit
Education Building, Room 510, West Hall
Albany, New York 12234

Supplemental Notification of Board Vote
Determination of Probable Cause
Section 3020-a, Education Law

To: the Commissioner of Education

This finding of probable cause as to the charge numbered III was affirmed by the following board members, constituting a majority:

1. Joseph Ribando	4. Bernard Modder	7. _____
2. Robert Quinn	5. Constance Jones Phelps	8. _____
3. Keld Alstrup	6. Michael Santoianni	9. _____
(names)	*(names)*	*(names)*

The following board members, constituting a minority, voted against a finding of probable cause:

1. _____	3. _____
2. _____	4. _____
(names)	*(names)*

The following board members were absent:

1. _____ 3. _____

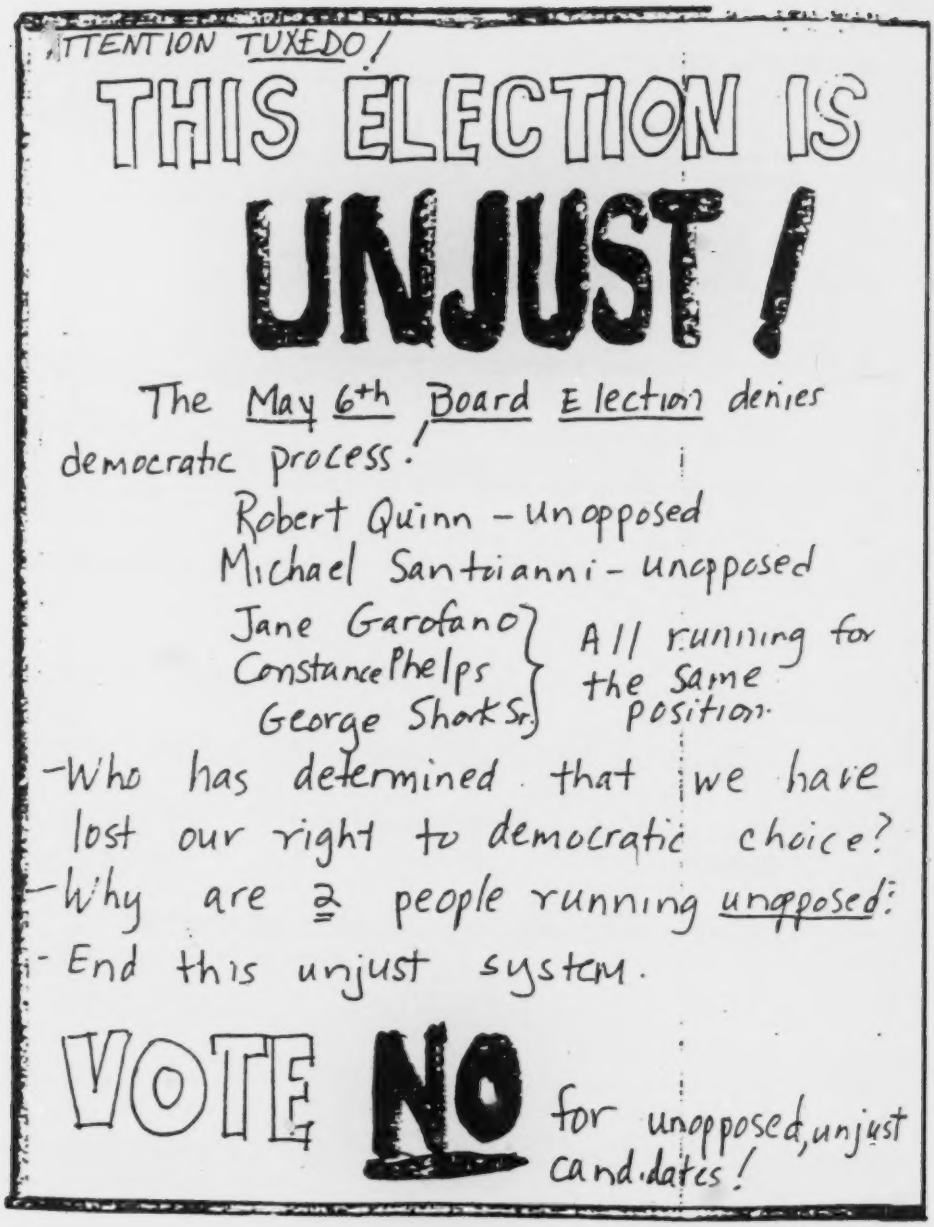
2. _____ 4. _____
(names) *(names)*

There is one vacancy on the Board

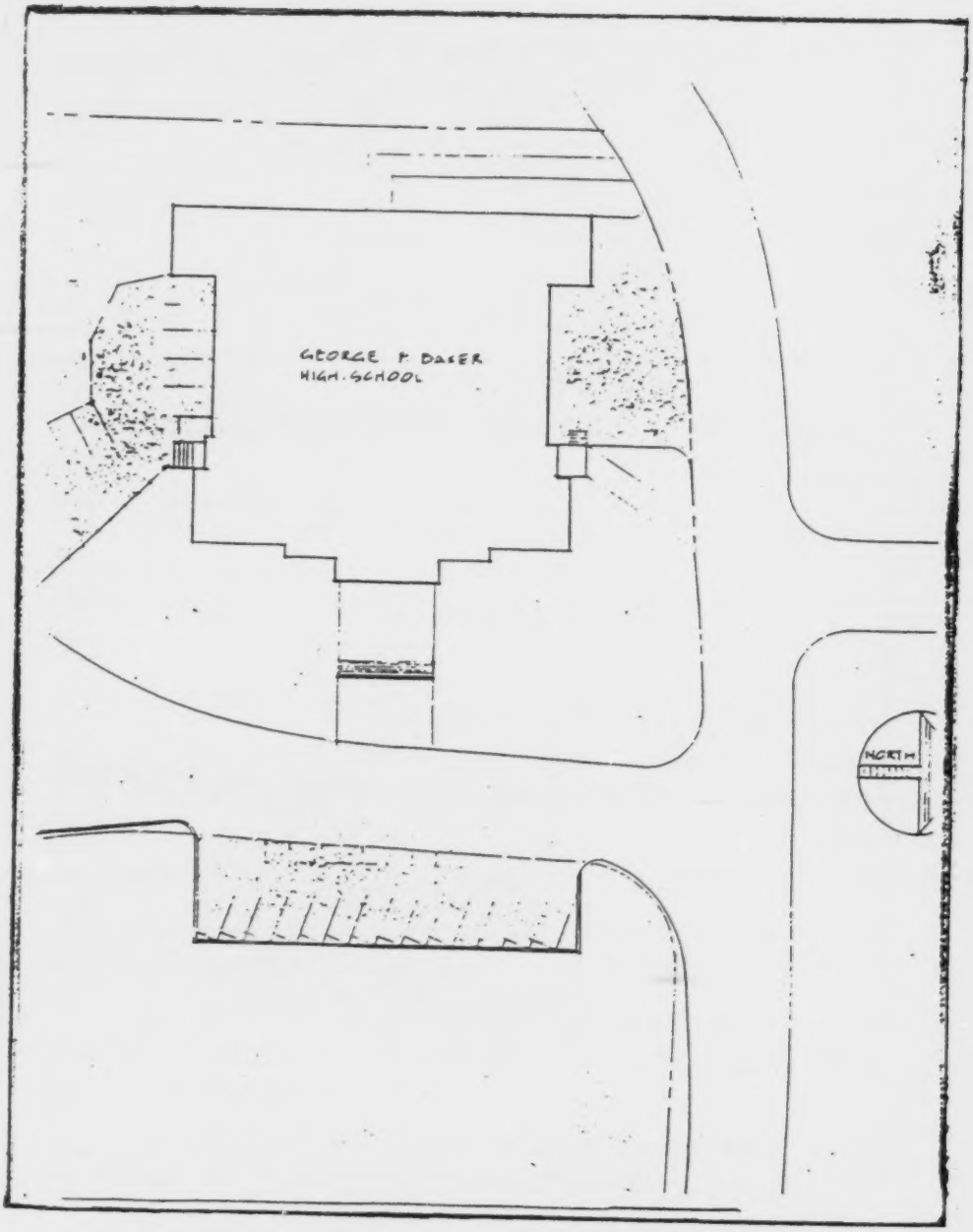
9/8/92
(Date)

/s/
(Signature of District Clerk or Secretary of the Board of Education)

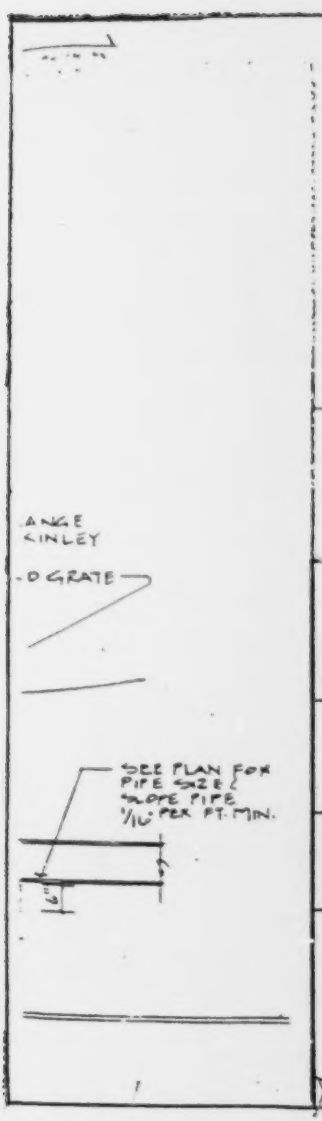
NOTE: There should be a separate vote as to each charge.



* This is a reproduction, reduced to 56 percent, of the flier distributed by Brian Cullen on May 6, 1992, and attached to the Complaint as Exhibit B.



* Pages 79a and 80a contain a reproduction, reduced to 56 percent, of the diagram attached to the Complaint as Exhibit C.



JOB NUMBERS:
44-19-03 02-0-001-003
44-19-03 02-0-002-003
44-19-03-02-0-003-003

SITE PAVING & DRAINAGE
TUXEDO UNION FREE SCHOOL DISTRICT
TUXEDO NEW YORK

SITE PLAN

CLARK AND WARREN ARCHITECTS
BOICE ROAD · HYDE PARK NEW YORK · 12538

SCALE 1" = 40'-0"
DRAWN
DATE 2/15/71
REVISED

DWG NO.
SP1
OF 1

APPENDIX F (cont'd)

Answer to Complaint, filed May 27, 1993, with Exhibits A and B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN CULLEN, Plaintiff, — against — DR. HERBERT FLIEGNER, JOSEPH RIBANDO, ROBERT QUINN, KELD ALSTRUP, BERNARD MODDER, CONSTANCE JONES PHELPS, MICHAEL SANTOIANNO and THE TUXEDO UNION FREE SCHOOL DISTRICT, Defendants.	ANSWER 93 Civ. 2569 (CLB)

Defendants, by their counsel, Guazzo, Perelson, Rushfield & Guazzo, hereby submit their Answer to the Complaint herein as follows:

AS TO THE FIRST CAUSE OF ACTION

1. Admit the allegations of paragraphs numbered 1, 3, 4, 6, 7, 8, 12 and 13 of the Complaint.

2. Admit the allegations of paragraph numbered 2 of the Complaint, except deny that the Tuxedo Union Free School District is located in Goshen, New York.

3. Deny the allegation of paragraphs numbered 5, 9, 43, 44, 47, 48, 49, 50, 51 and 52 of the Complaint.

4. Deny the allegations of paragraph numbered 10 of the Complaint, except admit that no formal disciplinary proceeding

under Education Law § 3020-a was brought against plaintiff until February 15, 1990, when the defendant District filed two charges against plaintiff pursuant to Education Law § 3020-a and that plaintiff was found guilty of one of the two charges after a hearing and was fined $1,250.00 by a three-member panel. The decision of the panel, including a recitation of the charges, is annexed hereto as Exhibit A and the Court is respectfully referred to said decision for a full and complete statement of the charges and panel decision.

5. Deny the allegations of paragraph numbered 11 of the Complaint, except admit that on February 13, 1992, the District filed two charges against plaintiff pursuant to Education Law § 3020-a, that by decision of July 21, 1992, announced on or about September 1, 1992, the panel found the plaintiff guilty of both charges and that by written decision of the panel dated October 26, 1992, plaintiff received a penalty of four months suspension without pay. The July 21, 1992 and October 26, 1992 decisions of the panel, including a recitation of the charges is annexed hereto as Exhibit B and the Court is respectfully referred to said decision for a full and complete statement of the charges and panel decision.

6. Deny the allegations of paragraph numbered 14 of the Complaint, except admit that a hearing on the charges referred to in paragraph numbered 12 of the Complaint was commenced before a three-member panel on February 26, 1993, at which time the District presented its evidence in support of the charges. The Court is respectfully referred to the transcript of these proceedings ("Transcript"), annexed as Exhibit A to the May 10, 1993 Affidavit of David S. Shaw previously submitted to the Court in opposition to plaintiff's application for a preliminary injunction for an accurate and complete statement of the testimony submitted in support of the charges.

7. Deny the allegations of paragraph numbered 15 of the Complaint, particularly deny the characterizations of testimony therein and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of defendant Fliegner. Defendants admit that neither on or before May 6, 1992 did anyone actually physically measure the distance of 100 feet from the school entrance on behalf of the District.

8. Deny the allegations of paragraphs numbered 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of defendant Fliegner.

9. Deny the allegations of paragraph numbered 27 of the Complaint and respectfully refer the Court to Exhibit B to the Complaint for an accurate and complete statement of the contents of the flier, except admit that two of the six Board members who voted in support of a finding of probable cause for the Education Law § 3020-a charges against plaintiff were identified in the flier, as were three other individuals running for a Board position, none of whom were members of the Board who voted on the finding of probable cause.

10. Deny the allegations of paragraphs numbered 28, 29, 30 and 31 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of District Clerk Nancy Bourke.

11. Deny the allegations of paragraphs numbered 32, 33, 34, 35 and 36 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of District Business Administrator Joseph Zanetti.

12. Deny the allegations of paragraphs numbered 37, 38, 39 and 40 of the Complaint and respectfully refer the Court to the Transcript for an accurate and complete statement of the testimony of Police Officer Kelly.

13. Deny the allegations of paragraph numbered 41 of the Complaint, except admit that on September 1, 1992, defendant Fliegner telephoned the plaintiff and asked whether plaintiff could meet with him that day for a meeting defendant Fliegner had requested, that the plaintiff was unable to attend such a meeting and that during the conversation, defendant Fliegner advised the plaintiff that he would be reviewing certain matters with the Tuxedo Board of Education, including the events of May 6, 1992.

14. Deny the allegations of paragraph numbered 42 of the Complaint and respectfully refer the Court to the Transcript for an

accurate and complete statement of the testimony of defendant Fliegner.

15. Deny the allegations of paragraph numbered 45 of the Complaint, and respectfully refer the Court to the Transcript for an accurate and complete statement of the representations of the parties and agreements and stipulations of the parties, except admit that plaintiff moved to dismiss the charges on the very same constitutional ground set forth in the Complaint.

16. Deny the allegations of paragraph numbered 46 of the Complaint, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that on April 16, 1993, plaintiff's counsel was advised by telephone by the chairman of the panel that the motion was denied by a 2 to 1 vote.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. The Court must abstain from deciding this action and dismiss this action under the doctrine enunciated by the United States Supreme Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971).

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. Plaintiff has waived the assertion of the claims set forth in the Complaint before this Court.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

20. The Court lacks jurisdiction over the Complaint as it fails to assert a justiciable claim.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

21. The individual defendants are immune from suit as against the plaintiff's claims under the doctrine of Qualified Immunity.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

22. The defendant Tuxedo Union Free School District and its Board of Education are immune from suit as against the plaintiff's claims under the doctrine of Absolute Immunity.

WHEREAS, the defendants demand a judgment dismissing the Complaint in all respects and granting the defendants such other and further relief as may be just and proper, including an award of their costs and reasonable attorney fees.

Respectfully submitted,

GUAZZO, PERELSON,
RUSHFELD & GUAZZO
Attorneys for Defendants
207 East 31st Street
New York, New York 10016
212/696-9500

By _____/s/_____
Mark C. Rushfield (MCR 0231)

N.Y. State Education Department
Division of Employer-Employee Relations File # 2205

In the Matter of the Charges By

Tuxedo Union Free School District

vs.

Brian Cullen

ARBITRATORS: Arthur T. Jacobs, Chairperson
Ernest Cannava, Board Panel Member
Joseph E. Kolman, Employee Panel Member

PARTICIPATION: For the District

David S. Shaw, Esq.
Carmine Antonelli, High School Principal

For Mr. Cullen

Paul H. Janis, Esq.
Brian Cullen, Teacher

HEARING: October 29, 1990 and January 9, 1991. Briefs received February 11, 1991

THE CHARGES

The District filed two charges against Mr. Cullen on February 15, 1990. The first:

> . . . that on or about November 5, 1989, (he) . . . in violation of previous directives given to him requiring him to give two (2) weeks notice to the Building Principal and to gain approval from the Building Principal prior to taking students on field trips . . . did, without authorization, take students from his Physics Class on an airplane to do physics experiments.

The second:

> (He) . . . was "mooned" by (exposed to the buttocks of) six (6) students in his Physics Class on December 1, 1989 following an invitation by (him) for the students to do so, issued by him in class during the month of September, 1989.

CHARGE I

Mr. Cullen did take four students in his physics class on an airplane ride and conducted physics experiments during the trip without informing Mr. Antonelli in advance and without District authorization. He did so on a non-school day, Sunday, because he believed that they would benefit from observing such experiments first hand.

Mr. Antonelli testified that on September 27, 1983 he sent a memorandum to Mr. Cullen in which he stated:

> It is against school policy to take students out of school without going through the proper procedure. A field trip request form must be filed at least two weeks prior to any trip and a permission slip for each student is necessary to release him or her from school for insurance purposes.

He also presented Mr. Cullen on December 23, 1988 a memorandum which Mr. Cullen signed and which stated:

> As per our conversation, you are in no way to take your Physics class on an airplane trip to do experiments. This is not, and will not be, approved or condoned by the District.

In addition, the District presented the statements in the Faculty Handbook dealing with field trips:

> The trip must be approved by the Principal and the Superintendent of Schools.

Specifically, with non-school sponsored trips:

a. School facilities and class time may not be used for the purpose of promoting such a trip unless permission has

been obtained from the Superintendent of Schools. This prohibition includes class announcements . . .

b. Any communication with students regarding a non-sponsored trip shall take place outside of the school day.

c. Announcements and communications with students and parents must mention that the trip is not a course requirement, and that the school system is not responsible for loss of property or personal injury. It must also be stated that the trip has no connection with the school or the Tuxedo School District.

Under STUDENT TRIPS SPONSORED BY EMPLOYEES are two sentences:

> Occasionally staff members will do this on their own and not as part of an organization. These trips are not under district sponsorship or control, and the district accepts no responsibility or liability for such trips.

After he learned of the airplane incident, Mr. Antonelli questioned Mr. Cullen, who told him that the ride was not on school time and not part of the school's program. Mr. Cullen and Mr. Antonelli, however, testified that the experiments conducted on the ride are part of the physics curriculum.

Mr. Cullen stated that he asked his class if any would like to do physics experiments in an airplane and when seven of his 16 students said they would, he "felt obligated to give these kids their money's worth" and he told them that "I'll go and arrange it" (t. p. 86). He testified that he called their parents and told them that the trip would be on his time and that the school was not involved.

He did not believe at that time that he was violating Mr. Antonelli's memorandum of December 23, 1988, which he had signed, because he had taken the liability upon himself and believed that in doing so he met the guidelines in the Faculty Handbook for STUDENT TRIPS SPONSORED BY EMPLOYEES.

He acknowledged that he had requested permission to take students in an aircraft in 1988 to do experiments and that his request had

been denied. He also admitted that the 1989 trip had been planned on school time and in school facilities and that he did not discuss insurance with the parents or ask then to sign waivers holding the District free of liability should there be an accident

After the first hearing in this case Mr. Cullen contacted the pilot of the plane and learned that his passengers are covered by liability insurance. A copy of the policy shows that it provided a maximum of $100,000 bodily injury and property damage per individual.

One of the four students who took the airplane ride testified that he did not know if Mr. Cullen contacted his parents for permission, but that he himself told them he would be going up in an airplane with Mr. Cullen and friends to conduct physics experiments. A second student knew that Mr. Cullen had talked to his mother about the trip before she gave permission.

CHARGE II

Mr. Cullen was "mooned" by six students on December 1, 1989. He was "outraged", chastised them and immediately reported the incident to the Dean of Students with the recommendation that they be given a one day in-school suspension. He testified that the concept of "mooning" came up in his all male class while he was conducting an experiment involving astronauts and one of the students exclaimed "Look at his bulge" or "Check out the bulge". Mr. Cullen reprimanded him and spent 10-15 minutes, he said, telling the class not to "bring ('perverted') things like that into physics class".

At the close of his scolding:

> . . . because either we were on the moon with Galileo (the experiment) or something happened, the word "moon" was in the air, and I said "What will it be next, we'll be mooning each other?"

When he asked the students why they "mooned", they answered "You told us to", but he cannot recall ever doing so. He agreed that he had told his students at the beginning of the school year that whatever happened in the class would be "confidential".

Mr. Antonelli testified that when he investigated the "mooning" incident, one of the students, Daniel Devine, told him that Mr. Cullen in the context of confidentiality in his class had told the students that they could "even moon". All the other students who had "mooned" told him essentially that they believed they could do anything in Mr. Cullen's class and it would be kept confidential. He testified also that the students agreed that Mr. Cullen had never told them to "moon".

Mr. Devine testified that Mr. Cullen had not given the class permission to "moon". However, when the bulge in the pants incident occurred, Mr. Cullen first told them that the remark was "stupid" and then:

> . . . looked around and saw it was all guys. He said, oh, it's all guys in the class . . . We can say anything . . . that you wouldn't say if there was a girl in the room. We can even moon each other.

He added on examination by a panel member that he did not take Mr. Cullen's statement "literally":

> We took it as he was just trying to express the fact that there were guys in the classroom and that, you know, kind of like building our confidence . . . I don't think many people heard it maybe, because people I talk to don't remember him saying it. We were all spread around the TV.

And when asked by the panel member "Did you think in any way Mr. Cullen encouraged you and your friends to 'moon'?", he answered "No".

Mr. Jenkins, another of the six students, testified that Mr. Cullen had not given them permission to "moon", that it was a "free", an "easy going class" and so "some people probably thought they could get away with it".

Mr. Andrew Sugar, a student who did not "moon", testified that Mr. Cullen did not give the class permission to "moon". He did remember that the subject of "mooning" came up during the Galileo experiment and the remark about the "bulge", but he could not

remember in what context. And he stated that when the "mooning" occurred Mr. Cullen "was shocked".

Mr. Antonelli and the students all testified that Mr. Cullen is an excellent teacher, and Mr. Cullen promised never to take his students up in an airplane again.

POSITIONS OF THE PARTIES

In the Brief filed on his behalf Mr. Cullen, apropos the first charge, the airplane trip:

> concedes that . . . he did not take sufficient steps to place this activity outside the auspices and responsibility of the District, and that, therefore, he was bound by the Field Trip Policy; and, in fact, stated on the record that he would not attempt to make such an arrangement for his class again.

This breach of the Policy, however, argues the Union, was only a technical violation. It urges the panel:

> . . . in assessing the appropriate penalty, (to) consider that the airplane ride to do physics experiment was done solely for the benefit of respondent's students and that the respondent did not personally gain financially or otherwise from the trip. . . . testimony of his students, and the general testimony of Principal Antonelli show beyond any doubt that respondent is an enthusiastic teacher who works his students hard and leaves them with a positive lasting school experience when they leave his science class. Respondent's transgression herein is one of over enthusiasm to make his science class interesting and exciting for his students, not one of neglect of duty . . .

Since the purpose of 3020-a "is not to punish teachers but to determine fitness", the Union suggests that Mr. Cullen's penalty for this violation be simply a formal letter of reprimand, it to include directives that all future trips by him "must strictly comply with the rules, regulations and policies of the District". It argues against suspension, because even the District has acknowledged by not

suspending him itself that he is a valued teacher and his students should not be deprived of his teaching.

It also argues against a financial penalty because it believes that would "stifle his enthusiasm and independence" and because it asserts the District did not take "the time to counsel respondent about its concern in this matter".

The District does request a severe financial penalty for what it characterizes as "insubordination and/or conduct unbecoming a teacher and/or incompetence": Mr. Cullen knew from being repeatedly told "no" when he requested permission to take his students on airplane trips to conduct experiments that actually doing so was an act of insubordination; he claimed to have called all the parents and received permission from them, but one of his own witnesses testified that Mr. Cullen had not contacted his parents; he placed the lives of the students at risk and exposed the District to contingent liability; and the same experiments could have been performed in an elevator without creating these risks and liability.

On Charge 2 the District asserts that the testimony of three students clearly shows that:

> the students' action of mooning was a result of, and caused by, the Respondent's invitation to the students that such behavior would be allowed in his class.

It contends that Mr. Cullen admits to making a "mooning" comment and six students did "moon", so Mr. Cullen's statements and comments in class must be viewed "as a substantial contributing factor in causing the mooning incident. . .". He should, therefore, be disciplined for "inviting deviant behavior in a class room and lacking appropriate student disciplinary standards".

ANALYSIS

Let us state at the outset that we consider the "mooning" incident trivial, inconsequential, of no significance. It was an act that occurred in one class room, only once, and was never duplicated by any students in the school ever again. It, therefore, did not cause any damage to the school's teaching staff or administration or the

content of the school program. There was no negative impact on the conduct of other students.

In addition, when "mooned" Mr. Cullen certainly reacted as though he had never condoned "mooning". He was "shocked", to quote one of the students present. He certainly proved that he was by the lecture he gave the students against bringing such "perverted" acts to his class room, by immediately reporting the incident to the Dean of Students, and by himself recommending a one-day suspension for the students who engaged in the act.

The student witnesses all testified that he had not authorized "mooning". If some students thought that they could "moon" because at one time he mentioned it in the context of an experiment and had told them that whatever went on in the class room would be "confidential", they leaped to a conclusion which Mr. Cullen obviously never intended and for which they have themselves primarily to blame. They merited the suspension they received.

Mr. Cullen pleads guilty to Charge 2, the airplane ride. This violation of established policy, which he well knew, having had identical airplane trips rejected twice before and having signed a statement summarizing the prohibition, is serious. He did put the lives of four students at risk and subjected the District as well as himself and the pilot of the plane to a tremendous liability.

As penalty, we do not favor suspension because obviously that would be a grave loss to the students in his classes. He is a dedicated, competent, and enthusiastic teacher. Nor do we believe a reprimand is sufficiently commensurate with the seriousness of the violation and the potential risks imposed on the students, their families, and the District. We disagree with the Union's contention that he was not adequately counseled about the concerns of the District. Twice before he had been counseled against taking his students on airplane trips.

Normally, we would recommend a substantial fine. In this case, however, we believe the fine should only be large enough to underline the seriousness of the violation and be a deterrent to any further gross violation by Mr. Cullen of District policies. Given the fine we recommend here, the penalty then would undoubtedly be

substantially greater. But we also believe that the fine should not be punitive. Mr. Cullen is clearly a very fine teacher; such teachers should be encouraged and even cosseted. And we believe that he has learned his lesson from this unfortunate incident.

RECOMMENDATIONS

1. Mr. Cullen is guilty of Charge I and should be fined one thousand two hundred and fifty dollars ($1,250).

2. Charge 2 against Mr. Cullen should be dismissed.

/s/
Chairman

/s/
Board Panel Member

/s/
Employee Panel Member

STATE OF NEW JERSEY)
) ss:
COUNTY OF UNION)

Sandra J. Meckler, being duly sworn, deposes and says that:

She is the Impartial Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 21st day
of July, 1992

ALFRED M. SCHNEIDER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires October 3, 1994

STATE OF N.Y.)
) ss:
COUNTY OF DUTCH)

, being duly sworn, deposes and says that:

He is the Board Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 24th day
of July, 1992

Notary Public, State of New York
No. 499 7623
Residing in Dutchess County
Commission Expires 6/15/94

STATE OF NEW YORK)
) ss:
COUNTY OF PUTNAM)

, being duly sworn, deposes and says that:

Mary Uhle is the Employee Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 24 day
of July, 1992

[Notary Stamp]

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
SCHOOL DISTRICT EMPLOYEE-EMPLOYER RELATIONS UNIT

In the Matter of
TUXEDO UNION FREE SCHOOL DISTRICT, TUXEDO HIGH SCHOOL,
Complainant,

Against

BRIAN T. CULLEN,
Respondent - Tenured Employee
Pursuant to Section 3020-a Education Law
Proceeding (File #2,496)

BEFORE: SANDRA J. MECKLER, ESQ., IMPARTIAL CHAIRMAN
MR. DENNIS GEISLER, BOARD PANEL MEMBER
MS. MARY E. UHLE, EMPLOYEE PANEL MEMBER

APPEARANCES:
FOR THE TUXEDO UNION FREE SCHOOL DISTRICT: SHAW & SILVEIRA, ESQS., BY: DAVID S. SHAW, OF COUNSEL
FOR THE RESPONDENT, BRIAN T. CULLEN: JAMES R. SANDNER, ESQ., BY: PAUL JANIS, ESQ.

OPINION OF THE CHAIRMAN

Background

Pursuant to Section 3020-a of the Education Law and Part 82 of the Rules and Regulations of the Commissioner of Education, I was designated as Impartial Chairman of the above-listed tripartite panel to hear and determine whether the Respondent is guilty of certain charges which were preferred against him by a vote of the Board of Education of Tuxedo Union Free School District

(District). At the District's request and without objection by Respondent, the issue of penalty was reserved for determination in a separate hearing, if required by the findings herein.

Throughout the course of these proceedings, both the Board and the Respondent had representation by counsel, examined and cross-examined witnesses, presented documentary evidence and submitted post-hearing briefs in support of their positions. A transcript of the hearing was made in accordance with the law.

The charges are as follows:

CHARGE I MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about December 4, 1991, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of upper elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about January 17, 1992, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, the presence of elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect. This conduct was undertaken after receiving directive from Elementary School Principal, Jan Hammond, not to repeat the flame igniting activity which occurred on or about December 4, 1991.

> In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

At the hearing, the parties stipulated as follows:

> On December 4, 1991 and January 17, 1992, the Respondent held a cigarette lighter in an open position and pumped a single spray from a two ounce Binaca breath spray which ignited for less than one second. This demonstration was conducted in the high school cafeteria before fourth, fifth, and sixth grade students while Mr. Cullen was serving as cafeteria supervisor, for which he was compensated $20. per day, pursuant to a provision in the collectively negotiated agreement between the Teacher's Association and the District.

The District's Position

With respect to Charge I, the District concedes that Respondent clearly believed that his Binaca demonstration was safe. The District, however, maintains that it is not challenging the demonstration for its actual danger at that moment, but rather, because of the dangerous elements used (a lighter and an aerosol spray), the improper setting involved, and most importantly, the potentially dangerous effects such a demonstration could have on young students who might attempt to replicate it.

In this regard, the District points to the testimony of the elementary school principal, Jan Hammond. Upon hearing of the demonstration from certain students, Ms. Hammond said she went to every elementary school class on December 4, 1991, in order to stress the dangers involved in igniting matches or lighters. Ms. Hammond further testified that the students appeared confused as to the nature of product used in the experiment, calling it a "magic flame" and telling her that it was "a spray and aerosol can or hair spray". [Tr. 14] Thus, while Binaca can only spray for a brief moment, the District emphasizes that many over-the-counter products are stored in aerosol cans that can continuously spray, thereby creating the potential for disastrous consequences if the demonstration was repeated with some other product.

The District also argues that the demonstration lacked the safeguards of a typical science experiment since (1) Respondent performed it in the cafeteria, rather than in a classroom with safety apparatus, and (2) Respondent failed to warn of the dangers in attempting to duplicate his actions. In this regard, the District notes that in the cafeteria setting, many students beyond those in the group the Respondent was addressing would be able to observe the cause and effect of the demonstration, without knowing specifically how it was created.

With respect to Charge II, the District argues that Ms. Hammond credibly testified that she warned Respondent on December 9, 1991 not to perform the Binaca demonstration again; despite such warning, Respondent admittedly repeated it on January 17, 1992, thereby justifying a finding of insubordination. Specifically, Ms. Hammond testified that, after attending an administrator's meeting on December 9, 1991, at which she learned the exact nature of the product involved, she called Respondent aside at the cafeteria condiments counter and informed him not to conduct any such activity again. Ms. Hammond said she learned in a meeting on January 23, 1992 that Respondent had again performed the demonstration. She then conferred with the school superintendent, leading to the filing of the instant charges on February 13, 1992.

Accordingly, the District maintains that a preponderance of the evidence supports a finding of guilt on both charges.

Respondent's Position

a. Evidentiary Standards

At the outset, Respondent argues that the charges against a tenured teacher, in order to be sustained, must be substantial and not picayune, citing *Tessier v. Board of Education U.F.S.D.*, No. 5, 19 N.Y.2d 680 (1967) (directing reinstatement of teacher who was dismissed for making advances towards a student); *Matter of Walsh*, 3 Ed. Dept. Rep. 159 (even if proven, charges would not be sufficient basis for dismissal); and *Matter of Brink*, 7 Ed. Dept. Rep. 9 (to remove a tenured teacher, the charges must be both substantial and substantiated). Citing Richardson on Evidence,

Tenth Edition, Section 97, 1973, Respondent further argues that, under the "fair preponderance" test, if the proof is equally balanced between the parties, the decision must go against the party upon whom the burden of proof rests, i.e. the District herein.

Respondent also maintains that the District's evidentiary burden cannot be met by hearsay testimony alone, citing *Matter of Board of Education of Highland Falls - Fort Montgomery Central School District v. Nicolacopoulos,* 22 Ed. Dept. Rep. 96 (hearsay alone is insufficient to sustain a charge where Respondent has been precluded from cross-examining the source of the allegations contained therein); and *Matter of Erdman v. Ingraham,* 28 A.D.2d 5, 280 N.Y.2d 865 1967 (hearsay evidence may not be used by an administrative tribunal in such a manner as to deprive a party of the right to a fair hearing.)

Furthermore, Respondent maintains that the District, in order to establish insubordination, must prove that his actions were in defiance of a direct order, citing *Matter of Board of Education of Community School District No. 24 of the City School of the City of New York v. Scwartzberg,* 30 Ed. Dep't Rep. 445 (1991) (when relying upon a prior reprimand or directive to a teacher, petitioner must prove that such warning provides more than a vague direction for future conduct).

b. The Proof

In applying these standards to the proof adduced at the hearing, Respondent argues that the District failed to meet its evidentiary burden. The experiment, according to Respondent, was conducted to instill a sense of excitement about science and, as such, did not rise to a level of chargeable conduct under the Education Law.

Specifically, Respondent asserts that he is a high school science teacher who strives to bring science out of the classroom and into everyday experience. In his voluntary position as an elementary school lunchroom monitor, he one day approached a table with about five boy scouts and jestfully wagered one hundred dollars that they could not light a fire without matches. He testified that he performed the Binaca experiment for the boys a week later,

saying "You know what this is? You can't use it in lighting a fire." [Tr. 43]

Respondent maintains that the experiment poses no threat to safety and that there is no reason to assume that the students felt otherwise, given universal warnings to children about fire and matches. Furthermore, Respondent claims that the District itself did not deem it a serious event, since Ms. Hammond, even if her testimony is credited, did not speak to him about it for five days and never issued him a written warning. Instead, Respondent points out, Ms. Hammond wrote him a note dated January 7, 1992, praising him for his idea of taking photographs of "the best table" in the lunchroom. Thus, Respondent questions why such a minor action would warrant a written note, while an allegedly important one required only a conversation by the lunchroom condiments counter.

Respondent also claims that he is not guilty of insubordination since he complied with the only directive he received about performing the experiment. While he recalls Ms. Hammond telling him at some point during his lunchroom assignment not to accept "gummy bears" from the children, Respondent denies that she told him not to do the Binaca demonstration. Rather, he claims that the first time he was ordered not to perform the experiment was in a letter from the high school principal dated January 17, 1992, and since that date, he has not done so. Ms. Hammond's testimony should be discredited, according to Respondent, because at the time of these events, the Board's decision regarding Ms. Hammond's tenure was pending.

Discussion

Contrary to Respondent's assertion, I am not persuaded that the experiment was of such minor significance as to fall outside the parameters of chargeable misconduct. Although he may have been motivated on December 4, 1991 by a desire to intellectually stimulate the students involved, Respondent clearly failed to exercise sound judgment in performing the experiment as he did. Aside from how safe this particular experiment may be in a controlled setting, the mere igniting of a pocket lighter by a table of children in an elementary school lunchroom poses safety issues.

Furthermore, other than mentioning that "you can't use it in lighting a fire", Respondent neither explained the nature of the demonstration to the students, nor cautioned them not to repeat the experiment, particularly with a different aerosol product.

Nor do I agree that the District placed little significance on Respondent's actions. Ms. Hammond credibly testified that after speaking to some of the students and an aide shortly after the December 4, 1991 experiment, she proceeded to speak with the high school principal, Carmine Antonelli. She testified that "I asked him if he wanted me to write up the incident because of the—with my students being at such an impressionable age I was highly concerned about this, and he said that he would take care of it." [Tr. 15] She said she then spoke to every elementary school class, kindergarten through six, to warn them of the dangers involved. On Monday, December 9, 1991, Ms. Hammond testified that she attended an administrator's meeting where the experiment was discussed and decided that she "wanted to make sure that [she] had covered very clearly [her] feelings as the elementary principal." [Tr. 21] Thus, apparently learning that the high school principal had taken no action, she went to the lunchroom, where she asked Respondent to come aside to the condiments counter. She says she then told him that "These students in my elementary school are at a very impressionable age and that he is not to do any kind of activity during the lunch hour with my students there using flame or fire or anything of that nature." [Tr. 22] Clearly, these are not the actions of an administrator unconcerned by Respondent's actions.

Therefore, I reject the contention that the charges were too picayune to amount to chargeable misconduct and find that Respondent is guilty of misconduct, conduct unbecoming a teacher, and neglect of duty with regard to the December 4, 1991 Binaca experiment.

In crediting Ms. Hammond's testimony, I note that she was a forthright witness, who answered the questions in a consistent and complete manner. In contrast, Respondent was vague, inconsistent, and evasive throughout his testimony. For example, although Respondent said that he had no recollection of dates because he

"doesn't keep a diary", he remembered that he never performed the Binaca experiment after reading Mr. Antonelli's letter dated January 17, 1992, which he thought he received in December. [Tr. 51-52]. This, of course, is inconsistent with the parties' stipulation that Respondent performed a second Binaca demonstration on January 17, 1992. Respondent's confused and inconsistent rendering of the events is further exemplified by this excerpt of his testimony:

> Q. I would like to ask you if you can recall having said this to Jan Hammond, February 13, 1992 at about 8:30 in the morning: "Oh, Mrs. Hammond"—this is you speaking—"I got a letter after you told me not to do the experiment any more. I didn't. Just like when you told me not to eat any more in the cafeteria, I didn't. You know, they are trying to bring me up on a 3020-a charge again and I don't want that again. You know I didn't do it again once you told me not to."
>
> Did you say that to her?
>
> A. 8:30 in the morning? I am, I believe, in the middle of the first period. How could I have? But I think you are referring to the conversation I had with her, and I did ask her, "Why are you saying these things that you told me about Binaca?"
>
> Q. That wasn't my question. You heard the statement which I made which I attributed as being your statement, your words —
>
> A. Could you just reiterate it?
>
> Q. Yes. "Oh, Mrs. Hammond, I got a letter, after you told me not to do the experiment any more. I didn't. Just like when you told me not to eat any more in the cafeteria, I didn't. You know, they are trying to bring me up on a 3020-a charge again and I don't want that again. You know I didn't do it again once you told me not to."
>
> A. The last part sounds valid, but the first part doesn't. Oh, I got a letter? Say that again? Oh, I got a letter about doing the Binaca after you told me"? That's impossible.
>
> Q. Yes.

A. That's impossible.

Q. I am not asking you what's possible or not possible. Just whether you said these words.

A. I didn't say that.

Q. Did you say to her, "You know I didn't do it again once you told me not to"?

A. Yes, I said that. No, I didn't—say that again?

Q. "You know I didn't do it again once you told me not to."

A. The Gummy Bears?

Q. No, I am referring to the experiment in the cafeteria.

Thus, in a question that clearly concerned the 3020-a charges arising from the experiment, Respondent agrees that he said to Ms. Hammond, "You know I didn't do it again one you told me not to." Apparently recognizing where this testimony has led, Respondent then attempts to appear confused by the line of questioning.

This leads to the issue of insubordination in Charge II. Even apart from the above-quoted testimony, Respondent clearly admitted that he performed the experiment again despite the administration's position:

Q. What do you remember the children saying to you when you repeated the incident?

A. Whenever I saw them, the ones with the hundred dollar bet, they said do it; do the experiment. And after I was told not to do it. I said, "I can't. I got word from above, I can't do it down here."

Q. But you did do it again after they said to you, "Brian, come on, do it again, do it again." You did repeat it at least the second time?

A. I admitted to that already, that I did it, that I did the Binaca experiment.

Q. When they were saying, "Brian, come on, do it again." were you hesitating about doing it again?

A. Yes, because you don't want to burn a grabber. You don't hang the picture up and then point it out. You let it ferment. You don't do it over and over again and then it isn't a grabber any more.

Thus, even had I not credited Ms. Hammond's testimony, Respondent's own testimony establishes that he had received a clear directive not to repeat the experiment, which he disregarded. In performing the demonstration for the second time, I therefore find on Charge II that Respondent was guilty of insubordination, as well as misconduct, conduct unbecoming a teacher, and neglect of duty.

In accordance with the foregoing Opinion, I make the following Determination and

RECOMMENDATION:

1) Respondent, Brian T. Cullen, a tenured teacher in the Tuxedo Union Free School District is guilty of misconduct, conduct unbecoming a teacher, and neglect of duty with respect to Charge I;

2) Respondent, Brian T. Cullen, is guilty of misconduct, conduct unbecoming a teacher, neglect of duty, and insubordination with respect to Charge II;

3) The penalty shall be determined in a separate hearing scheduled for August 11, 1992.

Dated: Short Hills, New Jersey
July 21, 1992

/s/

Sandra J. Meckler, Esq.
IMPARTIAL CHAIRMAN

Mary Uhle, EMPLOYEE PANEL MEMBER,

concurring in part and dissenting in part:

I agree with the foregoing opinion with respect to Charge I insofar as I find that Respondent engaged in conduct unbecoming a teacher by performing the Binaca experiment in a lunchroom setting. This action showed poor judgment and undermined his position as a role model for the students. Nevertheless, Respondent's action was not so grave as to constitute "misconduct" or "neglect of duty" within my understanding of those terms.

Regarding Charge II, I find that Respondent is guilty of misconduct and conduct unbecoming a teacher, since his testimony established that, in performing the experiment for a second time, he knew he was doing something he should not. I cannot agree to a finding of insubordination, however, since the administration had not issued him a written directive by the time of the second experiment. Without a clear written directive regarding the administration's position, a finding of insubordination cannot be substantiated. Nor do I believe that in doing the experiment for a second time, Respondent's actions rose to the level of "neglect of duty."

Dated: Brewster, New York
July 24, 1992

/s/

Mary Uhle
EMPLOYEE PANEL MEMBER

Mr. Dennis Geisler, BOARD PANEL MEMBER,

concurring:

I concur in all respects with the Opinion, Determination, and Recommendation of the Impartial Chairman.

Dated: Hyde Park, New York
July 24, 1992

/s/

Dennis Geisler
BOARD PANEL MEMBER

STATE OF NEW YORK
STATE EDUCATION DEPARTMENT
SCHOOL DISTRICT EMPLOYEE-EMPLOYER RELATIONS UNIT

In the Matter of
TUXEDO UNION FREE SCHOOL DISTRICT, TUXEDO HIGH SCHOOL,
Complainant,

Against

BRIAN T. CULLEN,
Respondent - Tenured Employee
Pursuant to Section 3020-a Education Law
Proceeding (File #2,496)

BEFORE: SANDRA J. MECKLER, ESQ., IMPARTIAL CHAIRMAN
MR. DENNIS GEISLER, BOARD PANEL MEMBER
MS. MARY E. UHLE, EMPLOYEE PANEL MEMBER

APPEARANCES:
FOR THE TUXEDO UNION FREE SCHOOL DISTRICT:
SHAW & SILVEIRA, ESQS., BY: DAVID S. SHAW, OF COUNSEL FOR THE RESPONDENT, BRIAN T. CULLEN:
JAMES R. SANDNER, ESQ., BY: PAUL JANIS, ESQ.

OPINION OF THE PANEL

Background

On July 28, 1992, the Chairman issued an Opinion finding Respondent guilty of misconduct, conduct unbecoming a teacher, neglect of duty, and insubordination with respect to charges filed by

the Tuxedo Union Free School District ("District"). The charges stemmed from a demonstration involving a cigarette lighter and "Binaca" breath spray which was performed by Respondent on two occasions in the course of his duties as an elementary school cafeteria supervisor. The Board panel member concurred in the Opinion in all respects, and the Employee panel member concurred in part and dissented in part.

It now remains for the panel to assess the appropriate penalty. In so doing, the panel has taken into account Respondent's prior disciplinary record. Specifically, Respondent was found guilty of a charge arising from an incident on November 5, 1989, in which he took his students on an airplane trip to perform physics experiments, in violation of established policy. Believing the fine "should only be large enough to underline the seriousness of the violation and as a deterrent to any further gross violation . . . of District policies", the panel there recommended a fine of $1,259, which was implemented by the School District Board on March 21, 1991.

Unfortunately, this fine did not have its desired effect, since less than ten months later, Respondent performed the demonstration in the lunchroom after being instructed not to do so because of the safety hazards involved. Aside from exercising poor judgment in performing the experiment in the first instance, Respondent reaffirmed the perception that he feels free to disregard certain directives of the District.

In deciding upon our recommendation, we considered the District's arguments that termination is the appropriate penalty in this matter. As the Union pointed out, however, Respondent has been a high school science teacher for twenty years and the incidents involved here did not involve his actual teaching duties. Yet, we are charged with the duty of recommending a penalty that will act as a deterrent to the improper conduct. After taking all factors into consideration, we find that neither a fine nor discharge are appropriate. Rather, we recommend that Respondent be suspended for four months without pay.

Accordingly, we make the following Determination and

RECOMMENDATIONS:

1. Respondent Brian T. Cullen is guilty of the charges in accordance with the Chairman's Opinion dated July 25, 1992.

2. Respondent should be suspended for four months without pay.

Dated:

October 26, 1992

/s/

Sandra J. Meckler, Esq.

IMPARTIAL CHAIRMAN

/s/

Dennis Geisler

BOARD PANEL MEMBER

Mary E. Uhle

EMPLOYEE PANEL MEMBER

Accordingly, we make the following Determination and RECOMMENDATIONS:

1. Respondent Brian T. Cullen is guilty of the charges in accordance with the Chairman's Opinion dated July 25, 1992.

2. Respondent should be suspended for four months without pay.

Dated:

October 27, 1992

Sandra J. Meckler, Esq.

IMPARTIAL CHAIRMAN

Dennis Geisler

BOARD PANEL MEMBER

/s/

Mary E. Uhle

EMPLOYEE PANEL MEMBER

STATE OF NEW YORK)
) ss:
COUNTY OF DUTCHESS)

Dennis Geisler, being duly sworn, deposes and says that:

is the Board Mbr. Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/
Sworn to me this 22nd day
of October, 1992

Rose F. Mancuso
Notary Public, State of New York
No. 4997633
Residing in Dutchess County
Commission Expires June 15, 1994

STATE OF NEW JERSEY)
) ss:
COUNTY OF ESSEX)

Sandra J. Meckler, being duly sworn, deposes and says that:

She is the Impartial Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

October 26, 1992
Sworn to me this day
of October, 1992

Rose Lia
Notary Public of New Jersey
My Commission Expires Aug. 27, 1996

STATE OF NEW YORK)
) ss:
COUNTY OF PUTNAM)

Mary E. Uhle, being duly sworn, deposes and says that:

She is the Employee Panelist in a case arising under Section 3020-a of the New York Education Law between the Tuxedo Union Free School District and Brian Cullen, a tenured teacher, and that the above Opinion, Determination and Recommendation and signature are mine.

/s/

/s/

Sworn to me this 27th day
of October, 1992

Carmella J. Cutrera
Notary Public, State of New York
Qualified in Putnam County
Commission Expires Jan. 31, 1994
4840193

APPENDIX G

Excerpt from Transcript of February 26, 1993 Hearing Before Panel Constituted Pursuant to New York Education Law § 3020-a

* * *

MR. SHAW: If I understand what you're saying, Mr. Isseks, you're asking for the panel to rule on the merits of the constitutional law issue or else indicating you may choose to go to Federal Court at this juncture to have that issue decided; is that what you are saying?

MR.ISSEKS: I am not making that threat.

MR. SHAW: It isn't a threat.

MR. ISSEKS: I do rest upon what was said in the argument, that we do see a major First Amendment violation; and yes, analogous to the matter that I am referring to that has been preliminary enjoined by the District Court, I believe there are grounds to get a preliminary injunction of this proceeding.

However, we have the panel that has the entire issue before it and is prepared to decide that issue once it's been briefed. I would like the opportunity for the panel to do so, rather than put Mr. Cullen through the ordeal of continuing with the 3020-a proceeding any further or forcing his hand to go into the Federal Court. Yes.

Again, it's not a threat, just a statement of what I perceive to be the posture of this proceeding at the present moment.

MR. SHAW: I understand what you have said. I think at this point I have to consult with my client to decide whether or not, essentially, we're willing to allow the merits of the constitutional law argument to be decided by the panel at this juncture with the understanding that should it be decided against the district that's the end of the case before the respondent's case is put on record; if you're following what I said.

MR. ISSEKS: No, I don't understand the import of what you said at all.

MR. SHAW: What I am saying is, under our reading of this regulation the panel chairperson cannot dismiss a case on the merits unless there is a consent from the complainant, Dr. Fliegner, or the attorneys, our firm, if we were to have the panel hear the constitutional law issue, have it briefed and stop the rest of these proceedings pending the determination of the constitutional issue. If their ruling is that there is a constitutional issue which precludes discipline in their view, that would be the end of this proceeding on its merits. That's what we understand your interest in saying stop it now, review the constitutional law issue, come back with a ruling; and if the ruling favors your position, this case is over on the merits.

THE CHAIRMAN OF THE PANEL: Let me suggest this, Mr. Shaw. I think I understand your point. I would suggest that maybe that could be addressed in your brief to us as to the rights of the chairperson and/or the panel to rule on this motion with or without prejudice to you at this point in time. Does that sound, would that allow you to address that question? So we will have the further benefit, Mr. Isseks, as to your reasoning asking that it would be improper for us, as I understand it, to dismiss now without the approval of you or your client.

MR. SHAW: You're one step ahead of what I am suggesting. I would confer with the client right now to see whether or not we were willing to waive, to allow you to proceed to the merits of the constitutional issue.

THE CHAIRMAN OF THE PANEL: Why don't you do that.

Off the record.

(Discussion off the record.)

THE CHAIRMAN OF THE PANEL: Back on the record.

MR. SHAW: I have consulted with Dr. Fliegner, who is the complainant in this case, and the district is willing, within the meaning of regulation 82.10 e, to allow the chair to determine

whether or not the case should be dismissed based upon the constitutional law claim of respondent's counsel, that meaning not only without prejudice but with prejudice should it go to the merits of the case having heard the district's prima facie case. We would be willing to abide by whatever the ruling is.

So at this point we're ready to submit briefs on a date set. We're also ready, if respondent wishes to present any witnesses, to have those witnesses go forward.

THE CHAIRMAN OF THE PANEL: Thank you, Mr. Shaw.

Let me reiterate my understanding. I have read 82.10 e since you raised it and I understand your argument. However, as I indicated, in a recent prior case when a motion to dismiss was raised it was decided by the entire panel, I think with some reference to case law which indicated that it would be the entire panel that would decide that. So at this point in time I am going to ask for the briefing of this, perhaps on this point as well, whether or not it's the chairperson alone or the entire panel, in spite of what 82.10 e says.

MR. SHAW: We would join with respondent's counsel in a stipulation for our purposes and this hearing that it can be the entire panel.

THE CHAIRMAN OF THE PANEL: I am sorry?

MR. SHAW: I didn't make that clear, but we're certainly willing to do that.

MR. ISSEKS: Stipulate that the entire panel decide the motion?

MR. SHAW: Yes.

MR. ISSEKS: Of course.

THE CHAIRMAN OF THE PANEL: I am sorry, the way you phrased your presentation I thought it was just the chairman.

MR. SHAW: I did say that. That was what it is in the agreement. I wasn't aware there would be a stipulation.

THE CHAIRMAN OF THE PANEL: Okay. Let's go off the record for a minute so we can talk about time frames in terms of the briefs and decision making.

Off the record.

THE CHAIRMAN OF THE PANEL: Back on the record.

After further discussion among the panel members and attorneys for plaintiff, the plaintiff district, and respondent teacher, it has been agreed that the attorney will prepare briefs to be filed, to be placed in the mail March 26th; that the panel will then consider, review the briefs and will deliberate during the week of April 12th; and that the chairperson will inform the attorneys for the complainant district and respondent teacher no later than Friday April 16th by telephone of the decision of the panel whether or not to dismiss or deny the motion to dismiss; and, in any event, we have scheduled a hearing which may just be to wind up and formalize the motion, the granting of the motion to dismiss or the continuation of the case, on April 22nd, at 10:00 a.m.; and that hearing will be here.

MR. SHAW: If not this building somewhere in this park.

THE CHAIRMAN OF THE PANEL: The district will inform the parties during the week of April 12th as to the location of the hearing on April 22nd.

It was also confirmed in discussions off the record that the matter to be briefed and the subject matter of the motion to dismiss will be limited to the question of the denial of the constitutional rights by the complainant district with respect to the complaint, to the charges against him.

Does anybody have any question about my statement, that statement or the procedure and the dates?

MR. ISSEKS: No.

THE CHAIRMAN OF THE PANEL: If not, this hearing is adjourned until April 22nd.

(Whereupon, at 3:50 o'clock p.m., the proceedings were adjourned to April 22, 1993, at 10:00 o'clock a.m.)

APPENDIX H

Decision of the Commissioner of the New York State Education Department, dated May 5, 1994

THE UNIVERSITY OF THE STATE OF NEW YORK
[Letterhead]

The State Education Department

Before the Commissioner

Appeal of the BOARD OF EDUCATION OF THE TUXEDO UNION FREE SCHOOL DISTRICT from a determination of a § 3020-a hearing panel concerning charges against Brian T. Cullen, a tenured teacher.

Shaw & Silveira, Esqs., attorneys for petitioner, David S. Shaw and Jay M. Siegel, Esqs., of counsel

Robert N. Isseks, Esq., attorney for respondent

Petitioner, the Board of Education of the Tuxedo Union Free School District, appeals the determination of a hearing panel convened pursuant to Education Law § 3020-a which found respondent guilty of misconduct, conduct unbecoming a teacher, neglect of duty and insubordination, and authorized his suspension without pay for four months. Petitioner seeks to terminate respondent's services. The appeal must be sustained in part.

Respondent is a tenured high school science teacher in the Tuxedo district. On February 13, 1992, petitioner found probable cause to prefer charges against respondent:

CHARGE I MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about December 4, 1991, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of upper elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

CHARGE II MISCONDUCT AND/OR CONDUCT UNBECOMING AND/OR NEGLECT OF DUTY AND/OR INCOMPETENCE AND/OR INSUBORDINATION

In that on or about January 17, 1992, Mr. Brian Cullen, a tenured teacher, while in the high school cafeteria during the fifth period, in the presence of elementary grade level students, ignited an aerosol spray creating a flame-thrower type effect. This conduct was undertaken after receiving a directive from Elementary School Principal, Jan Hammond, not to repeat the flame igniting activity which occurred on or about December 4, 1991.

In the event of a finding of guilt on the above-stated charge, the teacher's prior disciplinary record, if any, shall be introduced for the Section 3020-a Panel's consideration in determining the appropriate discipline.

A hearing was conducted on May 28, 1992 at which the parties stipulated as follows:

> On December 4, 1991 and January 17, 1992, the Respondent held a cigarette lighter in an open position and pumped a single spray from a two ounce Binaca breath spray which ignited for less than one second. This demonstration was conducted in the high school cafeteria before fourth, fifth, and sixth grade students while Mr. Cullen was serving as cafeteria supervisor, for which he was compensated $20 per day, pursuant to a provision in the collectively negotiated agreement between the Teacher's Association and the District.

In a decision dated July 21, 1992, the panel found respondent guilty of misconduct, conduct unbecoming a teacher and neglect of duty in connection with Charge I; and guilty of misconduct, conduct becoming a teacher, neglect of duty and insubordination with respect to Charge II. The panel then scheduled another hearing to determine the appropriate penalty.

On September 1, 1992, the panel reconvened to hear argument regarding penalty. Petitioner presented for the panel's consideration the March 11, 1991 determination of a panel in a prior disciplinary proceeding against respondent. That prior determination indicated that respondent had been found guilty of one charge of insubordination, conduct unbecoming a teacher and incompetency by failing to adhere to a directive that he not take high school Physics students on a small aircraft to conduct a zero gravity experiment. The prior panel imposed a fine of $1,250. In a decision dated October 26, 1992, the current panel took into account the prior finding of guilt against respondent and imposed a suspension without pay for four months. This appeal ensued.

Before addressing the merits of this appeal, I must address two procedural issues. In the memoranda of law submitted by both petitioner and respondent, the parties seek to introduce evidence that was not before the panel and was not set forth in any pleading. A memorandum of law may not be used to belatedly add assertions or exhibits which are not part of the record (*Appeal of Albert, et al.*, 32 Ed Dept Rep 615; *Appeal of Johnson*, 26 *id.* 42; *Matter of Bd. of Ed., Broadalbin CSD*, 24 *id.* 51). Accordingly, such new

exhibits will not be considered in this appeal. Respondent has also recently submitted two documents relating to a separate action between the parties in federal court. Since that federal action does not involve the issues in this case, I will not consider those submissions in my review of this matter.

Neither party to this appeal challenges the panel's findings of guilt. Accordingly, the sole issue for review is whether the penalty recommended by the panel is appropriate. Petitioner contends that it is too lenient, while respondent contends it is appropriate. As Commissioner, I may substitute my judgment for that of the hearing panel regarding the penalty imposed (*Matter of Mockler v. Ambach, et al.*, 79 AD2d 745, lv to app den 53 NY2d 603; *Matter of Kloepfer v. Commissioner, et al.*, 82 AD2d 974, affd 56 NY2d 687; *Matter of Shurgin v. Ambach*, 83 AD2d 665, affd 56 NY2d 700). In determining whether to substitute my judgment for that of the panel, I must review the measure of discipline imposed and determine whether it is proportionate to the offense.

Based on the record before me, I find that the penalty recommended by the panel is too lenient. Respondent argues that his action of twice holding a cigarette lighter in an open position and pumping a short spray from a breath spray container was not dangerous conduct. However, that argument ignores the fact that such action occurred outside of the context of legitimate class instruction and was performed before impressionable elementary school children. Respondent's conduct could easily have resulted in a young child attempting to copy respondent's act, with potentially serious consequences. This act, coupled with his prior action of taking students on an unauthorized airplane ride, indicates a pattern of irresponsible conduct with students.

Moreover, the instant matter and the incident regarding the airplane ride both involve actions taken by respondent after he had been specifically directed by district supervisors not to take such actions. The record of this appeal, therefore, also indicates a pattern of insubordination by petitioner. Repeated insubordination is "likely to undermine the discipline necessary for the operation of a sound school system" (*Matter of Bd. of Ed., Duanesburg CSD*, 18 Ed

Dept Rep 387; *Matter of Mockler v. Ambach, et al., supra*; *Appeal of Bd. of Ed., Uniondale UFSD*, 26 *id.* 498).

While I find respondent's conduct irresponsible and insubordinate and am not satisfied that respondent has acknowledged that his conduct in this and the prior matter was unjustified, termination of his employment is not warranted. Rather, a penalty must be imposed which is sufficient to impress upon respondent that his irresponsible and insubordinate behavior is unacceptable and must not continue. Accordingly, I find that the appropriate penalty is a one-year suspension without pay. In calculating the period of suspension, petitioner must take into account any period of suspension without pay already served by respondent.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that such portion of the decision of the hearing panel which recommended that respondent be suspended without pay for four months be, and the same hereby is, annulled.

IT IS FURTHER ORDERED that petitioner be, and hereby is, authorized to suspend respondent without pay for a period of one year, to include the period of suspension which respondent may have already served pursuant to the hearing panel's decision.

[Seal]

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 5th day of May, 1994.

/s/ Thomas Sobol
Commissioner of Education

No. 93-1906

(2)
Supreme Court, U.S.
OCT 13 1994

IN THE

Supreme Court of the United States

October Term, 1994

THE TUXEDO UNION FREE SCHOOL DISTRICT, *et al.*,

Petitioners,

against

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Does the enforcement of an otherwise valid state statute that prohibits electioneering within 100 feet of a polling place violate the free speech clause of the First Amendment in the absence of statutorily required distance markers, or their functional equivalent, defining the boundaries of the no-electioneering zone where the public is given absolutely no notice from monitors or anyone else that there is a prohibited zone and where enforcement of the statute is directed toward a single person only?

2. Does the "bad faith" exception to the abstention doctrine enunciated in *Younger v Harris*, 401 U.S. 37 (1971), permit a federal district court to enjoin a pending state administrative proceeding, initiated to determine the validity of disciplinary charges against a tenured high school teacher, based upon a finding by the district court that the charges were brought by a school district (a) acting with an "animus" toward that teacher, (b) attempting to enforce a statute narrowly restricting political speech against that teacher in a strictly *ad hominem* manner, and (c) where the school district itself had violated that very same statute by not advising the public in any way that there was a prohibition against political speech in a certain zone?

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BRIEF IN OPPOSITION TO PETITION

SUMMARY OF THE ARGUMENT

Contrary to the assertions made by petitioners on the very first page of their petition to this Court, the decision below neither "conflicts with the applicable decisions of this Court" nor "calls into question the constitutionality" of any election law of any state. Rather, this case involves a flagrant violation of basic and well established free speech and due process principles. Nor is the decision below a "dramatic departure" from the principles of abstention. Petitioners' *ad hominem* enforcement of New York's statutory restriction of political speech, directed solely toward respondent's expressions of criticism of the School District administration, coupled with the School District's indifference to the integrity of their polling place, falls squarely within the bad faith exception to the *Younger* doctrine.

This case is a perfect illustration of the sort of abusive, unchecked censorship that can result when the holding in *Burson v Freeman*, 112 S.Ct. 1846 (1992) is applied in an unprincipled and retaliatory manner. Petitioners are attempting to terminate respondent, who has been teaching for the School District for 18 years, because respondent was electioneering within 100 feet of the entrance to the School District polling place on the day of the School Board elections, May 6, 1992. Petitioners complain that respondent violated New York State Education Law §2031-a, the very same statute that petitioners themselves violated throughout that election day.[1]

Petitioners decided not to mention to this Court that the School District not only failed to place markers or post notice of the

[1]The complete statute reads as follows:

Electioneering within one hundred feet of polling place prohibited; distance markers.

(Footnote continued on next page.)

electioneering prohibition, but had no one monitoring the entrance to the polling place to make sure that there was no electioneering within the 100-foot area.[2] Petitioners decided not to inform this Court that they had no one on site to advise the public that there was any restriction at all on their right to political

---

(Footnote continued.)

> 1. At every election held for the office of trustee or member of a board of education and at every vote upon any proposition or issue in a school district where the election or vote is held at a different time from, and not during, the annual meeting of the district, there shall be conspicuously placed, by the inspectors of election, distance markers at a distance of one hundred feet from the polling place. Such distance markers shall indicate the prohibition contained herein and shall be so placed at least one-half hour before the opening of the polls and shall remain until the polls are closed.
>
> 2. At such elections or voting held at a different time from, and not during, the annual meeting of the district, while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election. For the purposes of this section, the one hundred foot distance shall be deemed to include a one hundred foot radial measured from the entrances, designated by the inspectors of election, to a building where such election is being held. This section shall not be deemed to prohibit the board of trustees or board of education from displaying within any polling place a copy or copies of any budget or proposition to be voted upon.

N.Y. Education Law 2031-a (McKinney's 1988).

[2]The conspicuous and less than candid absence of any mention of the lack of monitoring in petitioner's submission to this Court is troubling. (6-9) (Unless otherwise indicated, all numerals refer to the petition submitted to this Court by petitioners)

speech and that respondent was the only person to whom petitioners ever gave notice that day.[3]

There is no issue concerning petitioners' noncompliance with Education Law §2031-a. There is no dispute that petitioners failed to place any markers or post any other type of sign anywhere, even though Superintendent Fliegner knew about the 100-foot prohibition during the morning of the election. But just as important as petitioners' noncompliance with Education Law §2031-a is petitioners' failure to designate someone to monitor the school's entrance throughout the day to enforce the 100-foot prohibition. The consequence of having no one continuously watching the entrance, coupled with petitioners' failure to place the statutory markers or to post any other type of sign, was that citizens who were in the area were never given notice of the restriction on their right to free political speech. Respondent was the only one so notified.

Rather than making any attempt to comply with the statute's express and precise mandates or to otherwise place the public on notice of the statute's prohibition, petitioners decided to enforce the 100-foot restriction according to their own selective personal discretion. It is this subjective and arbitrary element in petitioners' method of enforcing the prohibition that makes it constitutionally repugnant. Petitioners' sparse and selective attention to the 100-foot radius was not only in direct contravention of the statutory requirement that the markers be conspicuously and continuously placed throughout the day; it undermined the compelling state interest enunciated by this Court in *Burson* in maintaining the integrity of the electoral process.

[3]This omission allows petitioners to make totally inappropriate interpretive statements such as, "In essence, the panel majority concluded that, because the School District failed to post distance markers at 100 feet from the polling place, Cullen was privileged—even after he received actual notice of the electioneering prohibition—to continue to electioneer at locations he knew were inside the 100-foot zone."(12)

Petitioners' restriction upon respondent's political speech within the 100-foot zone, without paying any attention to whether anyone else expressed political speech within that zone at any other times during that day, constituted a purely arbitrary method of restricting a fundamental First Amendment right. If this Court were to permit election officials to leave unposted and unmonitored the area which is supposed to be restricted and to enforce the political speech prohibition whenever and against whomever they choose, this Court would in effect be granting these officials the *unreviewable* discretion to determine which electioneering would be tolerated within the restricted zone and which would be prohibited. This constitutionally repugnant discretion is precisely what petitioners gave themselves on May 6, 1992.

It matters not for First and Fourteenth Amendment analysis whether anyone other than respondent electioneered within the restricted zone on the day of the election. Petitioners' enforcement of the restriction would be nonetheless arbitrary because they never did anything to make sure that there was no other electioneering going on within the zone that day. Petitioners cannot argue that their restriction of respondent's political speech furthered any legitimate state interest for the simple reason that petitioners have no idea whether anyone else might have been electioneering within the restricted zone. Such is the essential arbitrariness of petitioners' restriction upon respondent's First Amendment right. This very restriction served only to undermine the integrity of the polling place. When the compelling state interest is *integrity* (unlike interests such as security or public safety) it can never be advanced, as a matter of law and logic, by a restriction that is enforced arbitrarily.

As will be more fully explained below, petitioners' discretionary, *ad hominem* method of enforcing Education Law §2031-a cannot pass constitutional scrutiny because (1) it completely failed to advance the compelling state interest in (and sole pur-

pose of) the 100-foot restriction—to protect the integrity of the electoral process, (2) it was not narrowly tailored to advance that compelling state interest, and (3) it amounted to an abusive, bad faith exercise of unbridled censorship power, used by petitioners to punish an outspoken teacher they do not like and who they had been trying to get rid of.

Statement of the Case

1. Background.

Respondent has been a high school science teacher for petitioners' school district for approximately 18 years. Since February, 1990, petitioners have commenced and prosecuted three separate sets of disciplinary charges against respondent pursuant to New York Education Law §3020-a. Prior to this time respondent had never been the subject of any disciplinary proceeding. It is the third set of petitioners' disciplinary charges against respondent that forms the basis of this lawsuit.

Petitioners' first §3020-a proceeding against respondent consisted of two charges. The first complained that respondent took certain students on an unauthorized field trip in an airplane one Saturday to conduct physics experiments. Respondent admitted to the three-member §3020-a hearing panel that he did in fact take his students on this field trip. Petitioners' second charge alleged that respondent "was 'mooned' by (exposed to the buttocks of) six (6) students in his Physics Class... followed by an invitation by (him) for the students to do so...." (86a-87a) Respondent denied this charge and the hearing panel dismissed it as "trivial, inconsequential, of no significance." (92a) In setting its penalty on the first charge, a fine of $1,250.00, the panel stated that "the fine should not be punitive" because respondent "is clearly a fine teacher" and that "such teachers should be encouraged and even cosseted." (94a)

In their second set of §3020-a charges petitioners complained about a scientific experiment that respondent conducted in the school cafeteria in the presence of upper elementary grade level students. Petitioners alleged that they told respondent not to perform the particular experiment, which consisted of spraying "Binaca" mouthspray and igniting it to demonstrate its effect, and that respondent was insubordinate in doing so. Respondent admitted to the hearing panel that he performed the experiment but denied that he was insubordinate or that the experiment was in any way dangerous. The panel sustained the charge and suspended respondent for four months without pay. (107a, 112a) Petitioners, however, were not satisfied with this punishment fixed by the panel and they appealed to the New York State Commissioner of Education arguing that this science teacher of 18 years experience deserved to be terminated.[4] (32a)

2. Petitioners' third Education Law 3020-a proceeding against respondent.

After school hours on May 6, 1992, the day of petitioners' School Board election, respondent was passing out a flier in front of the high school entrance. The flier complained that the election process was unjust in that the two incumbents running for re-election were running unopposed while the three challengers were running against each other for the remaining seat on the board. (78a)

That election day, Fliegner, who was responsible for the conduct of the election, knew about the 100-foot prohibition of Education Law §2031-a because someone had just inquired about that very subject and he, Fliegner, researched the requirement in a handbook. (33a, 38a) Nevertheless, neither Fliegner nor anyone else did anything to make sure that the 100-foot prohibition was being enforced before 3:30 that afternoon. Up to that point, no

[4]Although the result of this appeal is not part of the record below, petitioners chose to insert it in their petition and appendix.

markers had been emplaced as required by §2031-a(l), nor had petitioners bothered to designate anyone to monitor the entrance, in lieu of the markers, to make sure that there was no electioneering going on in the restricted zone. (22a-23a, 38a) Petitioners hadn't even bothered to measure the 100-foot radius or to post any sign giving notice of the prohibition. (8a-9a,38a)

What first interrupted petitioners' insoucience concerning the protection of their polling place was when, at about 3:30 p.m., a member of the staff went inside the building and advised Fliegner that respondent was distributing a flier on the front steps of the school—a flier that was critical of the School District administration. (34a) Now, for the first time that day, Fliegner took action to make sure that there wasn't any electioneering in the area: Fliegner went out to confront respondent and to inform him that he was not to distribute his flier within the 100-foot radius. (34a) Respondent protested, saying that it was after school hours,[5] he had a right to be there and that he was not doing anything wrong. (34a) When Fliegner continued to insist that respondent remove himself, respondent replied, "You make up the rules as you go along." (34a-35a)

On several occasions later that day and evening, petitioners observed respondent in the subject area and took measures to remove him, including calling the police. (34a-38a) Significantly, however, petitioners still never took any steps to place the public on notice of the 100-foot prohibition.[6] (8a-9a, 22a-23a, 33a, 38a)

[5]According to the teachers' contract that was in effect on May 6, 1992, 3:30 p.m. was after hours for respondent (33a).

[6]For example, at about 4:00 p.m., when Fliegner was finished with his confrontation with respondent, he told Nancy Bourke, the District Clerk, that he was leaving, that there had been some trouble with respondent regarding electioneering, and that if Bourke had any problems she should call the police. Fliegner did not instruct Bourke to make sure the restricted area remained clear, and Bourke didn't bother to check on the entrance until one half hour later. (36a-37a)

Their focus was upon respondent exclusively, as they still never bothered to post any sign or designate anyone to monitor the area. (8a-9a) Throughout the entire election, right up to when the polls closed, petitioners made no effort to provide uniform notice or uniform enforcement of the content-based free speech restriction. (8a-9a)

Four months later, petitioner's School Board voted to bring this third set of §3020-a disciplinary charges against respondent for "illegal" electioneering. Robert Quinn and Michael Santoianni, the incumbents who were the subjects of criticism in respondent's flier, were two of the Board members who voted in favor of punishing respondent. (39a)

REASONS FOR DENYING THE WRIT

POINT I

Petitioners' arbitrary and selective infringement upon respondent's right to free political speech did nothing to advance the compelling state interest in maintaining the integrity of the electoral process.

In *Burson v Freeman*, 112 S.Ct. 1846 (1992), this Court made it clear that N.Y. Education Law §2031-a is facially valid because a 100-foot prohibition of political speech around a polling place advances the compelling state interest in maintaining the integrity of the electoral process. While *Burson* stands for the proposition that the government may prohibit electioneering within 100 feet of a polling place, it does not endorse the view that this prohibition may be enforced by any available means. This Court was quite explicit that its decision did not address "as applied" challenges and that such challenges should be made by an individual prosecuted for conduct allegedly violative of the statute. *Burson*, 112 S.Ct. at 1857, n 13. This Court noted that, if success-

ful, such challenges "would call for a limiting construction rather than a facial invalidation." *Id.*

The question that is presented in this case is whether petitioners did in fact advance that compelling state interest when they restricted respondent's political speech without making any attempt to provide uniform notice or enforcement of the statute's prohibition respecting the citizenry at large. Petitioners' actual notice argument misses this point entirely and *Bethel Sch. Dist. No. 403 v Fraser*, 478 U.S. 675 (1986), relied upon so heavily by petitioners, has nothing to do with this case. Respondent has never argued that he personally did not receive notice; the issue of adequacy of notice to respondent has never been raised.[7]

Respondent maintains that petitioners' failure to make sure that all persons in the area (not just respondent) knew of the restriction on their right to free political speech, coupled with petitioners' failure to make sure that no person in the area (not just respondent) electioneered within the 100-foot radius, utterly failed to advance—and effectively destroyed—that very integrity of the electoral process which the statutory restriction was intended to protect and which this Court in *Burson* held to be its constitutional justification.

Petitioners had no reason to restrict respondent's free political speech after they had paid absolutely no attention to the 100-foot radius from the time the polls opened that morning until 3:30 that afternoon. As stated succinctly in the *Burson* dissenting opinion: "Especially when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well." *Burson*, 112 S.Ct. at 1864.

[7]This is why the dissent below completely misses the mark when it mischaracterizes the majority opinion below as basing respondent's rights as to where to electioneer under "the guise of lack of notice". (18a)

A. *The nature of the Burson compelling state interest.*

In *Burson*, this Court upheld the constitutionality of a Tennessee statute prohibiting solicitation of votes and display of campaign materials within one hundred feet of a polling place.[8] After an examination of the evolution of election reform, both in this country and abroad, this Court concluded that a restricted area around polling places was necessary.[9] *Burson*, 112 S.Ct. at 1852-56. First, the Court found that "a State has a compelling interest in protecting voters from confusion and undue influence." *Burson*, 112 S.Ct. at 1851. Second, this Court recognized that "a State 'indisputably has a compelling interest in preserving the integrity [and reliability] of its election process itself.'" *Burson*, 112 S.Ct. at 1852 (citations omitted). This Court found that because these asserted interests involved the right to vote and the preservation of the "purity of elections" they justified the statute's infringement upon political speech in a public forum. *Id.*

B. *Petitioners' demonstrated indifference to the integrity of their electoral process.*

As the district court correctly observed, petitioners "made no effort whatever to police the area or send an agent out there to remain throughout the voting period or see whether other people were possibly electioneering."(26a) If petitioners had any concern

[8]*Burson* does not address the specific issue of narrow tailoring raised in this case. *Burson* involved a facial challenge to a statute. Similar to Education Law §2031-a, the Tennessee statute under scrutiny in *Burson* required objective "boundary signs" to be placed at the one hundred foot distance. *See* Tenn. Code. Ann §2-7-111(a) (1991). There was no evidence of non-compliance by election officials. Therefore, *Burson* did not address the issue of the method of enforcing the prohibition.

[9]Of course, the "restricted area" around the polling place which this Court held in *Burson* "was necessary," never existed at petitioner's polling place. There can be no "restricted area" if the public was never informed of the restriction.

for the integrity of their polling place, they would have made some effort to comply with Education Law §2031-a. At the very least, they would have made sure that no one, not just respondent, at no time during the day, electioneered within the prohibited area. But they didn't. Instead, Fliegner simply directed respondent to remove himself, called the police to remove him, and later went home for dinner. Neither Fliegner nor anyone on his behalf ever bothered to make sure that *the public* was being put on notice of the restriction on their right to free political speech.

Not having bothered to comply with the mandates of §2031-a, and not having bothered to place the public on notice of that statute's prohibition, petitioners are now unable to state to this Court whether anyone other than respondent knew of the 100-foot prohibition on the day of the election. With no person monitoring the entrance, petitioners are now unable to state whether anyone other than respondent electioneered within the restricted area. With no markers and with no signs, petitioners haven't even a reasonable ground for presuming that no one other than respondent electioneered within the restricted area. Thus petitioners may not now claim that their electoral process on May 6, 1992, ever had any of the "integrity" which formed the cornerstone of this Court's *Burson* decision. Petitioners, in other words, may not now argue that they in any way advanced the compelling state interest which is the constitutional prerequisite to the infringement upon the content-based political speech engaged in by respondent.

The dissent in the Court of Appeals is simply wrong to assert that the majority's selective enforcement rationale was "purely speculative since the [respondent] apparently has never claimed even to have seen anyone else who might have been electioneering in the area where he was."(17a) First, the majority's rationale deals not just with selective enforcement, but with selective notice, as well. Second, it was not up to respondent to make sure that the area was monitored from the time the polls opened early that morning until he arrived at the school entrance at "3:30 p.m., after his workday" (6), a span of some nine hours or so. This was the School District's responsibility—a responsibility imposed not only by Education Law

Section 2031-a, but by the reasoning of this Court in *Burson*—and a responsibility which petitioners chose to completely ignore. As noted by the majority below, "the School District's ability to document [respondent's] activities is in dramatic contrast to the virtual absence of information about the activities of others."(10a)

The suspicions expressed by the dissent notwithstanding, the fact that respondent did not claim he saw anyone else electioneering is certainly no basis for inferring that no one else was, especially when respondent was teaching for most of the day and was therefore not even at the site. As the majority below observed, "A government body charged with enforcing a law that seeks to preserve the delicate balance between the exercise of First Amendment rights and the promotion of fair and honest elections should not be permitted to ignore safeguards designed to preserve that balance, and then, at day's end, be able to report only on the activities of a single individual with whom bad blood already existed." (10a-11a) Petitioners and, apparently, the dissent below, are insensitive to that "delicate balance."

Because the 100-foot prohibition is constitutional only by virtue of its advancement of the compelling state interest found by this Court in *Burson*, and because petitioners' method of enforcement did nothing to insure the integrity of their polling place (since it restricted only respondent's electioneering and did nothing to put the public on notice), petitioners' method of enforcement was not even reasonable, let alone the least restrictive means.

The issue therefore is not one of state statutory construction. Petitioners are mistaken when they assert to this Court that the construction of Section 2031-a "divided the court below."(4) Rather than "constructing" Section 2031-a, the majority below was concerned with the arbitrary method by which petitioners chose to enforce 2031-a:

> Its method of enforcement provided no notice of either the parameters of the campaign-free zone or the nature of the electioneering prohibition itself. Nothing was used in lieu of

> the distance markers, nor was any one person assigned the responsibility of monitoring the campaign free zone for electioneering violations.

(8a) The majority concluded that petitioners' "efforts would appear to have focused exclusively on the activities of [respondent], someone with whom the School district 'had a past history of personal conflict.'" (10a)

Although the dissent below was interested in whether the New York State Legislature intended that the 100-foot prohibition be conditioned upon the placing of the prescribed markers, the majority accurately saw this question as irrelevant. Rather, the majority correctly perceived the issue as one of federal constitutional dimension: whether the prohibition contained in Education Law §2031-a may be enforced by a method which does nothing to protect the integrity of the electoral process and which involves an arbitrary and *ad hominem* focus upon a single dissenting individual.

POINT II

Petitioners' method of enforcing Education Law 2031-a was not narrowly tailored because it failed to provide either objective or uniform notice of the content-based restriction on the right to free political speech.

Because Education Law §2031-a is a content-based regulation of political speech in a public forum, it is not enough that the restriction on its face serves the compelling state interest in protecting the integrity of the electoral process. Petitioners must show that their *method of enforcing* the restriction was narrowly tailored to advance that interest. *See Burson*, 112 S.Ct. at 1851. The only means by which an infringement of content-based political speech may be regulated is the "least restrictive means." *Boos v Barry*, 485 U.S. 312, 329 (1988). In the context of a

content-based regulation on speech, a government regulation is not "narrowly tailored" if less intrusive means than those employed are available. *Id.*

Obviously hoping to catch this Court's attention, petitioners trumpet a false alarm that the opinion below has facially invalidated "the election laws of dozens of other states."(14) Respondent never challenged the facial validity of any election law that lacks a requirement to post markers. The reason is that, in this case, (1) there was neither objective nor uniform notice to the public of *any* kind and (2) there was a bad faith, strictly *ad hominem* enforcement of the electioneering prohibition. Hence there is no occasion in this case to determine whether the markers required by Education Law §2031-a constitute the only acceptable means of providing objective and continuous notice of an electioneering prohibition.

As respondent argued to the courts below, Education Law §2031-a assures that the infringement upon the First Amendment right is enforced in a narrowly tailored manner and therefore provides a *model* of the least restrictive means.[10] This is because the emplacement of markers serves to protect two important, indeed fundamental, constitutional principles. First, the markers clearly and objectively indicate the forbidden area, enabling citizens to conform their conduct according to the law. Second, because the school districts are required to place the markers "at least one-half hour before the opening of the polls and shall remain until the polls are closed" [Education Law §2031-a(1)], all members of the public who are in the area are put on continuous and uniform notice of the prohibition. This is not to say, however, that these two principles can only be served by emplac-

[10]Respondent submits that the least restrictive means of infringing upon the First Amendment rights at issue are provided for in Education Law §2031-a. But this particular proposition need not be decided in this case because of petitioners' remarkable failure to provide *any* uniform notice to the public.

ing markers. Respondent has consistently argued to the courts below that it was the failure to emplace markers *or their functional equivalent*—such as a designated monitor throughout the day—which violated his rights to free speech and due process. Respondent has made no contention—nor did the court below impose any requirement—that a state election statute must contain one specific method of enforcement in order to be constitutionally valid. It must be presumed that officials in other states are not going to engage in the kind of bad faith, *ad hominem* enforcement of their electioneering prohibition that has marred this case.

Respondent contends that the emplacement of markers, or their functional equivalent, ensures equal enforcement of the statute by those entrusted with prosecuting violators. It also lets each and every citizen know that he is not being singled out, since it will be apparent to him that the prohibition applies to everyone, equally, without regard to the content of his electioneering speech. Only by satisfying these two fundamental constitutional requirements can the electioneering prohibition be said to advance its intended goal—protection of the integrity of the electoral process.

A. *The due process function of an objective notice requirement.*

Because we assume that persons are "free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly." *Grayned v City of Rockford,* 408 U.S. 104, 108 (1972). The emplacement of markers or its functional equivalent would provide notice to those who wish to electioneer, thus providing a concise and accurate means of infringing upon the right of free speech. As this Court has noted, "[w]here First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed,' . . . assures us that the legislature has focused on the First Amendment interests and determined

that other governmental policies compel regulation." *Grayned*, 408 U.S. at 109 n 5.

By ignoring the requirements of Education Law §2031-a and by enforcing the prohibition according to their own unauthorized personal discretion, the school officials here entirely undermined the due process interests served by the objective markers. There was no clear line distinguishing between lawful and unlawful conduct, thus increasing the likelihood of arbitrary and capricious enforcement of the prohibition.[11] This, as this Court has emphasized, has a chilling effect on the exercise of constitutionally protected rights. Where an uncertain law "abuts upon sensitive areas of basic First Amendment freedoms it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden area were clearly marked." *Grayned*, 408 U.S. at 104.

"[V]ague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable." *Intern. Soc. for Krishna Consciousness v Eaves*, 601 F.2d 809, 823 (5th Cir. 1979).

Petitioners raise a non-issue when they dwell upon whether the distance of 100 feet is the maximum radius which may be restricted under the First Amendment. Respondent never made the frivolous argument that any distance greater than 100 feet would

[11]This was especially true since no one ever bothered to measure the 100-foot radius and point out that distance to respondent. Not even an attempt was made to distinguish lawful and unlawful conduct during most of the day when no school official was outside delineating the forbidden zone. During the period of time when no school official was outside indicating the forbidden zone, this purpose of the statute was completely undermined.

be violative of his right to free political speech. Petitioner's submission is misleading in its suggestion that such an argument was made. When the majority below made the point about respondent's not being able to stand "*just* 100 feet away" (18a), it was not implying that any restriction greater than 100 feet would be violative of the First Amendment. Rather, the point was made to illustrate the problem which arises when an objective delineation of the restricted zone is lacking. Because the statute proscribes electioneering within 100 feet, the members of the public are entitled to know where their speech is prohibited and where it is not. They should not be forced to guess and they should be confident that everyone else is being subjected to precisely the same prohibition. It is the complete lack of objectivity in petitioners' method of enforcement which respondent challenged and which the decision below addressed. Respondent *never* argued that a statutory restriction greater than 100 feet would be unconstitutional.

Petitioner's use of *Schirmer v Edwards*, 2 F.3rd 117 (5th Cir. 1993), like their adequacy-of-notice argument, serves only to distort the issues decided below. When the issue at bar is properly stated—whether the Constitution requires objectivity in the prohibition's enforcement—the Fifth Circuit's reasoning in *Schirmer* is readily seen to be in harmony with the Second Circuit opinion below. In *Schirmer* the appellants argued, *inter alia*, that Louisiana did not have a compelling interest in banning non-ballot political activity nor passive political speech around the polls. Rejecting this argument, the Fifth Circuit approved the view that "an across-the-board ban on politicking was necessary to protect voters' rights because any exceptions to the total ban on political speech would necessarily create the need for on the spot enforcement . . . [and] that to allow any politicking in the campaign-free zone would open the door to subterfuge." *Schirmer*, 2 F.3d at 122. The *Schirmer* Court concluded that "problems with on the spot decision making and varying degrees of enforcement would result in uneven application of the statute." *Schirmer*, 2 F.3d at 122. This is precisely why there must be objectivity in the enforcement of the prohibition and this is precisely the point grasped by the majority below.

In the absence of a clearly marked forbidden zone, petitioners created a condition which operated to inhibit the exercise of First Amendment freedoms. Clearly petitioners' method was not the "least restrictive means" of achieving the compelling state interest. Instead, petitioners' method risked causing citizens to "steer far wider of the unlawful zone" than necessary[12] thereby inhibiting the lawful exercise of the fundamental First Amendment right to express political speech.

B. *The equal protection function of a continuous and uniform notice requirement.*

As stated above, petitioners' method of enforcing Education Law §2031-a, in addition to failing to provide well-delineated objective notice, also increased the likelihood of arbitrary and selective enforcement.[13] While the government may infringe upon constitutional guarantees under limited circumstances, "it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not to all . . . ." *Brown v Louisiana*, 383 U.S. 131, 143 (1966).[14]

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[12]This is exactly what happened when Officer Kelly walked respondent "well outside the 100 feet." (36a)

[13]This Court has cautioned that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108.

[14]The government may not impinge "upon [First Amendment rights] . . . in an arbitrary and discriminatory manner without cause, justification, or reason." *Kreimer v. Bureau of Police for Town of Morrisville*, 765 F. Supp. 181, 195 (D.N.J. 1991). "It is beyond dispute that the government may not penalize or afford different, discriminatory treatment to a disfavored, disliked individual or class of individuals." *Id.*

Before and after respondent was told to cease his electioneering, when the officials were either inside the building or eating dinner in their homes, there was nothing in place, and no one stationed in the area, to prohibit persons from expressing other views (perhaps in support of the unopposed candidates), to prohibit persons from passing out their own fliers unimpeded, or to prohibit persons from engaging in some other form of electioneering.

The dangers inherent in petitioners' random and haphazard method of "protecting the integrity of the electoral process" are obvious. "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute." *Cox v Louisiana*, 379 U.S. 536, 557-58 (1965). The discretion in public officials to determine which views will be permitted "sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor." *Id.* Petitioners' arbitrary method of enforcement "effectively grant[ed] . . . [the School District] the discretion to . . . [punish] selectively on the basis of the content of speech." *City of Houston v Hill*, 482 U.S. 451, 465 n 15 (1987).

Petitioners essentially assumed discretionary censorship powers and authorized themselves to decide when it was appropriate to keep the 100-foot radius clear and when they didn't have to pay any attention to it at all.

What petitioners want this Court to ignore is that their utilization of verbal notice in this case amounted to giving notice only to respondent without ever bothering to make sure that everyone else in the area received the same notice. By fixating upon the fact that other states do not have marker requirements similar to New York's, petitioners attempt to divert attention away from the fact that their method of verbal notice on May 6, 1992 was purely

arbitrary. Perhaps verbal notice could withstand constitutional scrutiny if there were someone continuously monitoring the area to make sure that no one violated the prohibition. But that issue is not presented in this case. Rather, petitioners want this Court to hold that verbal notice of the infringement upon the right to free political speech may be given whenever they please and to whomever they please. This is precisely why respondent was justified in saying to Fliegner, "You're making the rules up as you go along."

In sum, petitioners' method of enforcing the prohibition opens wide the opportunity for abuse. It provides neither objective notice nor uniform notice. The result is unbridled, discretionary censorship power over content-based political speech.[15] As stated above, a restriction on political speech must be narrowly tailored to serve a compelling state interest. In this case, petitioners' method of enforcement, rather than advancing the compelling state interest, actually undermined it, and thus cannot be deemed in any way to be narrowly tailored.

POINT III

Petitioners' retaliatory and *ad hominem* enforcement of the electioneering prohibition falls squarely within the bad faith exception to the *Younger* abstention doctrine

Younger v Harris, 401 U.S. 37, 53 (1971) and its progeny are clear that a federal court should intervene if bad faith prosecution

[15]Just as in the case of vague statutes, petitioners' discretionary, *ad hominem* method of enforcing Education Law §2031-a is "unacceptable" because it "encourages arbitrary and erratic arrests and convictions." *Papachristou v City of Jacksonville*, 405 U.S. 156, 162, (1972); *see also, Poulos v State of New Hampshire*, 73 S.Ct. 760, 767, where this Court reiterated the well-settled principle that a regulation of First Amendment protected activity is invalid if it is left in the "uncontrolled discretion" of those entrusted with its enforcement.

or harassment or other "extraordinary circumstances" are present. *See, e.g., Middlesex County Ethics Comm. v Garden State Bar Ass'n.*, 457 U.S. 423, 435 (1982). It is difficult to imagine a stronger indication of bad faith prosecution than when government officials attempt to punish a person for violating a law which those officials knowingly violated themselves.

In the context of the *Younger* doctrine, "bad faith" generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction. *Kugler v Helfant*, 421 U.S. 117, 126 n 6 (1978). However, a showing that a prosecution was brought in retaliation for, or to discourage, constitutional rights "will justify an injunction regardless of whether valid convictions conceivably could be obtained." *Lewellen v Roff*, 843 F.2d 1103 (8th Cir. 1988), *cert den* 489 U.S. 1033 (1989); *see also, Fitzgerald v Peck*, 636 F.2d 943 (5th Cir. 1981), *cert den* 452 U.S. 916; *Wilson v Thompson*, 593 F.2d 1375, 1377 (5th Cir. 1979). In First Amendment cases the strength of the constitutional claim, while not establishing bad faith as a matter of law, strongly corroborates the allegation of the defendant's improper motive. *Winchert v Walter*, 606 F. Supp. 1516, 1522 (D.N.J. 1985).

Even though this case does not involve a First Amendment challenge to the facial validity of a state statute, abstention is inappropriate for the reasons stated by this Court in *City of Houston v Hill*, 482 U.S. at 467-471. Petitioners' bad faith, selective enforcement of a state statute which requires a delicate balance between a legitimate state interest of polling place integrity and the citizen's right to freedom of political speech presents a serious constitutional question that the courts below correctly entertained. As in *Hill*, petitioners'arbitrary method of enforcement is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Hill*, 482 U.S. at 468, *quoting Harman v Forssenius*, 380 U.S. 528, 534-535 (1965). Regardless of any state

court interpretation of Section 2031-a, the federal constitutional question at bar remains. As *Hill* makes clear, where resolution of the federal claim is not dependent upon a question of state law, it is immaterial that state courts have never interpreted the subject statute. *Hill*, 482 U.S. at 469-470.

The district court found that petitioners acted in bad faith by commencing and maintaining the disciplinary charges. In addition to a specific finding that the petitioners' actions rose to a level of "animus," the district court also found that "no disciplinary charges would have been brought except for the content of the pamphlet."(26a) The district court continued:

> Therefore, the Court finds the disciplinary charges were brought in bad faith and maintained and continued in bad faith and constitute an ongoing violation of the plaintiffs First Amendment rights to be free in his speech and not to be harassed or prosecuted in any way for his expressions or based on the content of his expressions since he could not be found to have violated the law because no markers were there.

(26a)

Respondent had been a teacher for petitioners' school district for about eighteen years. As of the day of the election, petitioners had prosecuted two then recent sets of §3020-a charges against respondent and were actively trying to get him fired. Their second set of charges was then still pending and had not yet been determined by the hearing panel when petitioners voted to commence a whole new set of charges aimed at disciplining respondent for violating the same statute that they themselves had violated. Before 3:30 in the afternoon of the day of the election, the school officials in the building had paid no attention to the school's entrance. It was not until a staff member came inside and brought to Fliegner's attention that "Mr. Cullen" was outside

passing out a flier (a flier that was critical of the School District administration) that Fliegner showed any concern about the 100-foot zone. Fliegner's conduct was transparently motivated by his animus against respondent, not by his concern for the integrity of the electoral process. The same is true for the subsequent conduct of the remaining petitioners when they voted to bring these disciplinary charges, as determined by the district court.

There is ample basis in this record for the district court to have drawn the inference that petitioners were acting in bad faith. Such an inference is not only reasonable, it is compelling in view of the significant First Amendment violation involved. *See Winchert*, 606 F. Supp. at 1522.

In essence, petitioners are asking this Court to substitute its own conclusion on the issue of bad faith for the conclusion reached by the district court. It is well established, however, that such *de novo* review is inappropriate. Because the decision whether to abstain "involves a discretionary exercise of a court's equity powers" the test applied "in reviewing district court abstention decisions is whether there has been an abuse of discretion." *Pue v Sillas*, 632 F.2d 74, 78 (9th Cir. 1980) (court reviewing district court's ruling regarding *Pullman* abstention); *see also, Hefner v Alexander*, 779 F.2d 277, 280 (5th Cir. 1985) (applying "clearly erroneous" standard in review of alleged facts that constitute bad faith harassment under *Younger* doctrine). "An abuse of discretion exists when the district court has made an error of law or of fact." *Reuters Ltd. v United Press Intern., Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). A trial court's discretion is exceeded "when the decision reached is not within the range of decisionmaking authority a reviewing court determines is acceptable for a given set of facts." *Id.*

It was readily apparent to the district court that when petitioners commenced their third 3020-a disciplinary proceeding against respondent they were not motivated by a good faith belief

that such charges were necessary in order to protect the integrity of their polling place. It was obvious to the district court that petitioners seized upon respondent's electioneering as an opportunity to bolster their then *ongoing* efforts to get respondent fired.[16] The majority below was correct in holding that the specific findings in the district court's opinion provided the basis for its conclusion that petitioners "sought Cullen's termination and that the charges that Cullen violated Section 2031-a were brought in retaliation for the exercise of Cullen's First Amendment right to protest the school board elections."(13a) As the majority below properly held, "Because the State of New York cannot have a legitimate interest in the disciplinary proceeding, permitting it to continue would not serve the purposes of the *Younger* doctrine..." (13a-14a)

Petitioners' abstention argument, therefore, fails for essentially the same reason their First Amendment argument fails: petitioners refuse to come to terms with the district court's basic finding that the School District engaged in a blatantly *ad hominem* restriction of respondent's fundamental right of political speech. The district court found that petitioners demonstrated a complete indifference to the integrity of their polling place (the sole justification for restricting respondent's speech in the first place). Petitioners abused the limited power accorded them to restrict political speech in their single minded effort to have respondent terminated. This demonstrated indifference to the integrity of their electoral process, coupled with the ongoing

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[16]Petitioners' second set of 3020-a charges against respondent were filed in February, 1992. The third set of 3020-a charges arising out of respondent's electioneering were filed in September, 1992. The hearing panel's penalty decision on the second set of charges was not rendered until October, 1992. When the panel authorized only a penalty of suspension on the second set of charges, petitioners appealed to the State Commissioner, hoping to get respondent terminated.

"grudge fight" which the district court found rose to the "level of a animus", provided ample basis for the finding of bad faith.[17]

In all likelihood this incident never would have occurred if petitioners had complied with the mandates of Education Law §2031-a and set up the required markers. If the markers, or their functional equivalent, had been in place, respondent would have had no cause to say to Fliegner, "You make up the rules as you go along. You use your position, your authority to get your way." Since the markers were not in place, and since there was no other indication to respondent that petitioners were applying the law to anyone other than himself, he was justified in believing that he was being discriminated against and unfairly censored. Petitioners opportunistically decided to try to fire respondent by taking advantage of their own violation of the law. This is blatant bad faith.

In light of the underlying facts and circumstances of this case it cannot be said that the district court abused its discretion by finding that petitioners acted in bad faith by commencing and maintaining the §3021-a disciplinary charges. There is ample proof in the record to support this finding and it should not be disturbed.

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[17]*Williams v Red Bank Bd. of Ed.*, 662 F.2d 1008 (3rd Cir. 1981), relied upon by petitioners, is clearly distinguishable since the plaintiff's complaint in that case did not allege bad faith or any facts similar, in quality or degree, that would provide the basis for inferring bad faith. *Williams* does not provide a factual scenario where the disciplinary body failed to comply with the very same law they were attempting to enforce, or where the court made a specific finding of animus, or where the defendants were engaged in an ongoing struggle to fire plaintiff, or where disciplinary charges went directly to the exercise of constitutionally protected political speech.

Conclusion

The First Amendment requires that the element of subjectivity be removed from the enforcement of any restriction upon content-based political speech. Because petitioners' arbitrary method of enforcing the 100-foot prohibition was pervasively subjective, it invited abuse and uneven application and actually undermined the "compelling state interest" in maintaining the integrity and reliability of petitioners' electoral process. Because petitioners were obviously not concerned with electioneering within the restricted zone, *per se*, but only with taking the opportunity to discipline respondent, their §3020-a proceeding was commenced and maintained in bad faith and was properly enjoined by the district court.

This Court should deny certiorari.

Dated: Goshen, New York
October 4, 1994

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In The

Supreme Court of the United States

October Term, 1993

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

v.

BRIAN CULLEN,

Respondent.

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WASHINGTON, D.C. 20543

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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BRIEF *AMICUS CURIAE* OF NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

INTEREST OF THE *AMICUS*

This brief is filed with consent of all parties. Letters of consent are on file with the Clerk of this Court.

The New York State School Boards Association (hereinafter "NYSSBA") submits this *amicus curiae* brief in support of Petitioners' petition for Writ of *Certiorari*.

NYSSBA is a corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred (700) or ninety-three (93) percent of such public school districts who are members

of this Association. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

NYSSBA has, in recent years, appeared as an *amicus curiae* in several state and federal judicial and administrative proceedings involving both the New York State and the nation's public schools. Included among those appearances have been: *Lamb's Chapel*, ___ U.S. ___, 113 S. Ct. 2141 (1993); *Cullen v. Fliegner*, 18 F.3d 96 (2nd Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Bd. of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987); *Winter v. Rhinebeck Cent. School Dist.*, 79 N.Y.2d 1 (N.Y. 1992); and *Derle v. North Bellmore Union Free School Dist.*, 77 N.Y.2d 483 (N.Y. 1991). Many such actions involved issues similar to those of the instant case including, but not limited to, statutory construction and constitutionality.

REASONS FOR GRANTING THE WRIT

Although *amicus* recognizes that this court is often reluctant to review a case involving the interpretation of a unique state law, the state laws involved in this case concerning anti-electioneering and tenured teacher discipline are similar to laws in other states. Thus, the decision of the court below sets a precedent that potentially will impact a number of states other than New York. The issue of the extent of the constitutional protection of

speech in the context of anti-electioneering statutes transcends school district elections and thus, is relevant to the administration of local and national elections in all states.

Additionally, the refusal of the lower court to abstain from intervening in a pending state administrative proceeding to discipline a school employee intrudes on the important state function of educating children. Since this court has previously recognized the importance of education as a state function, the decision below creates an untenable situation for schools in New York and across the nation. Particularly in light of the divergence in opinion between the court below and the Court of Appeals for the Third Circuit, states will be impaired in their ability to properly administer and supervise public schools by being precluded from appropriately managing their staffs.

The Court below, in failing to apply the *Younger* abstention doctrine permitted the respondent to circumvent New York State's comprehensive statutory scheme for the discipline of tenured teachers by local school boards. Intervention by federal courts, under the circumstances in this case, into the functioning of the tenured teacher disciplinary scheme would seriously hinder school boards in New York State and indeed in other states in their attempts to fulfill their obligation to provide students with a teaching staff which is competent, effective and cohesive.

STATEMENT OF FACTS

Amicus respectfully defers to the facts as described in the Writ for *Certiorari*. However, *amicus* would like to draw the Court's attention to several facts of particular significance to its arguments.

First, the petitioners commenced disciplinary charges against respondent, a tenured teacher employed by petitioner Tuxedo Union Free School District ("the District") on two occasions prior to the charges which were preferred in the instant case.

On February 15, 1990, the District filed charges against respondent alleging that respondent took students on an unauthorized field trip. Following a hearing before a statutorily convened administrative panel, the respondent was found guilty and was fined $1,250.

On February 13, 1992, the District filed a second set of charges against the respondent alleging that despite prior warnings, he ignited an aerosol spray in the presence of elementary students during school hours. Following a second administrative hearing, the respondent was found guilty and was suspended without pay for four months. Most recently, the Commissioner of Education determined that this penalty was insufficient and increased the penalty to a suspension without pay for one year. *Appeal of Board of Educ., Tuxedo Union Free School Dist.*, 33 Educ. Dep't Rep. ___ (Dec. No. 13171, May 5, 1994) (Appendix H to the Petition for Writ of *Certiorari*).

In the present case, on May 6, 1992, respondent was personally and repeatedly made aware by various officials of the District and by police officers of the Tuxedo

Police Department that New York Education Law §2031-a prohibits electioneering activities by any person within one hundred feet from the entrances of a building being used as a polling place during the hours that a school district election is being conducted. At this time, respondent was not asked to cease and desist from this activity but rather to engage in this activity beyond one hundred feet from the polling place. Indeed, respondent did not dispute the fact that at the time when he was electioneering, that he was within one hundred feet from the polling place. Respondent failed to demonstrate that any other person, in addition to himself, was engaged in electioneering within one hundred feet from the polling place.

At a statutorily authorized teacher disciplinary hearing, the respondent interposed, as a defense to the charges, the claim that his constitutional free speech rights were violated by the District's enforcement of the anti-electioneering statute. Following a denial of his constitutional defense by the administrative hearing panel, the lower federal district court found that the District had initiated and maintained the present disciplinary proceeding in bad faith and that, therefore, the bad faith exception to the federal *Younger* abstention doctrine applied. As a result, the district court issued an injunction against the further proceeding of the state administrative disciplinary action. The court below affirmed this determination.

ARGUMENT

I. The lower court erred in its finding that the bad faith exception to the *Younger* abstention doctrine applied thereby determining that federal court intervention is warranted when a previously disciplined employee maintains a constitutional claim in the context of a pending administrative disciplinary proceeding.

In its landmark decision in *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts must abstain from intervening in pending state criminal proceedings unless an injunction is necessary to prevent great and immediate irreparable injury. The *Younger* doctrine has been extended to apply to pending civil and administrative proceedings in which the state has a substantial interest. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987); *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008 (3rd Cir. 1981).

The *Younger* doctrine is founded upon:

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44.

Notwithstanding the fact that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions," *Younger*, 401 U.S. at 45, this Court has recognized several narrow exceptions to the *Younger* abstention doctrine. Thus, federal courts need not abstain from intervening in state proceedings when the state prosecution either: applies a patently unconstitutional statute; when the proceeding is brought by state officials in bad faith or for purposes of harassment; or when other extraordinary circumstances exist in which irreparable harm can be shown. *Younger*, 401 U.S. at 48-49; *Kugler v. Helfant*, 421 U.S. 117 (1975). *See also, Gibson v. Berryhill*, 411 U.S. 564 (1973); *Perez v. Ledesma*, 401 U.S. 82 (1971).

In the present case, the courts below found that the bad faith exception to the *Younger* doctrine applied and thus enjoined the District from proceeding forward in the pending tenured teacher disciplinary action. The courts below did not determine that the other two above noted exceptions to the *Younger* doctrine applied.

The lower court's decision to intervene was founded on a determination that the District applied the state statutory scheme for tenured teacher discipline in bad faith against the respondent in that the respondent was "someone with whom the School District 'had a past history of personal conflict' " and therefore enforced the electioneering prohibition "exclusively on the activities of [the respondent]." *Cullen v. Fliegner*, 18 F.3d 96, 102 (2nd Cir. 1994) (Appendix A to the Petition for Writ of *Certiorari*).

The court below apparently failed to appreciate that federal intervention was unnecessary because the New York State statutory scheme fully protects the due process rights of teachers like the respondent because the disciplinary proceedings under the statutory scheme provide a forum capable of adjudicating teachers' constitutional claims. Furthermore, the court's determination that the District acted in bad faith merely because the disciplinary charges enforcing the anti-electioneering statute had been preceded by prior disciplinary actions against the respondent implies that federal intervention will always be necessary to enjoin the application of the statutory scheme when districts proceed against teachers on more than one occasion.

Amicus respectfully submits that the Court below improperly found that the bad faith exception to the *Younger* abstention doctrine applied because the statutory scheme and its application in the present case do not evidence bad faith as articulated in previous decisions of this Court. *See, Younger*, 401 U.S. at 48-49; *Kugler*, 421 U.S. at 124.

The statutory scheme contained in New York's Education Law, and the implementing regulations adopted by the New York State Commissioner of Education, provides an administrative procedure for disciplining tenured teachers administered by the New York State Education Department which provides adequate due process protection of the rights of teachers charged with misconduct. *Kelly v. Board of Educ.*, 435 F. Supp. 904 (W.D.N.Y. 1977); *Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683 (N.Y. 1980); N.Y. Educ. Law §§3012, 3020-a; 8 N.Y.C.R.R. Part 82.

The statutory scheme adopted in New York provides teachers with: notice of the charges filed against them; an opportunity for a hearing before an independent three member panel (one of whom is selected by the teacher); the right to, but no obligation to, testify in his or her own behalf; the right to subpoena witnesses and cross-examine witnesses called by the school district; and the right to counsel. Educ. Law §3020-a(2), (3). All testimony at 3020-a disciplinary hearings must be taken under oath, and stenographic transcripts of the proceedings are kept and sent to the teacher at the expense of the Commissioner of Education. Educ. Law §3020-a(3)(c).

Although a tenured teacher may be suspended pending the outcome of the disciplinary hearing, **the teacher must be paid his or her full salary during any such suspension**. *Jerry v. Board of Educ., Syracuse City School Dist.*, 35 N.Y.2d 534 (N.Y. 1974). The employing school board must prove the charges of misconduct and the district must implement the determinations of the 3020-a hearing panel with respect to the teacher's guilt or innocence on the charges and the appropriate penalty imposed upon the teacher. Tenured teachers in New York enjoy the right to appeal an adverse decision of the 3020-a hearing panel to either the Commissioner of Education or to the local County Supreme Court. Educ. Law §3020-a(5).

As set forth above, the comprehensive statutory scheme adopted in New York ensures that the state administrative proceedings to discipline tenured teachers more than adequately provide a full and fair opportunity for teachers to interpose claims of constitutional rights in defense of 3020-a charges and authorizes hearing panels,

the Commissioner of Education and the New York State courts to adjudicate such constitutional claims.

This Court has found in similar contexts that other state administrative disciplinary proceedings like that in New York State are entitled to deference by federal courts. *See, Middlesex*, 457 U.S. 423. Likewise, the Court of Appeals for the Third Circuit has ruled that a similar tenured teacher discipline statutory scheme adopted by New Jersey involved an important state interest of fulfilling its commitment to provide public education and was adequate for purposes of resolving constitutional claims raised by teachers in the context of an administrative disciplinary action. *Williams*, 662 F.2d 1008. Thus, the Third Circuit ruled that the *Younger* abstention doctrine precluded the lower federal court from enjoining the pending teacher disciplinary action notwithstanding the teacher's claim of a violation of her First Amendment right to free speech. *Id.*

In addition to whether the administrative proceeding provides an opportunity to interpose constitutional defenses, as noted above, the court below also found that the District had acted in bad faith because it selectively enforced the anti-electioneering statute exclusively against the respondent. In the criminal context, selective enforcement in the prosecution of criminal charges has been sustained as evidence of bad faith warranting federal intervention only when the criminal defendant demonstrates the criminal charges have not been commenced against other similarly situated individuals while he has been singled out for prosecution **and** the state's prosecution has been invidious or in bad faith. *Gersten v. Rundle*, 833 F. Supp. 906 (S.D.Fla. 1993), *quoting, University Club v.*

City of New York, 655 F. Supp. 1323, 1328 (S.D.N.Y. 1987); *Schuler v. City of Chambersburg*, 641 F. Supp. 657 (M.D.Pa. 1986).

In this case, the respondent did not introduce evidence that any other similarly situated individuals were electioneering within 100 feet of the entrance to the polling place and thus, failed to demonstrate that he was singled out for prosecution by the school district.

As noted above, the lower court was also concerned with whether bad faith was evidenced by the ability under the statutory scheme of the District to bring multiple disciplinary actions against the respondent. With respect to the filing of multiple charges, requests for federal injunctions against pending criminal prosecutions have been denied when the criminal defendant claimed bad faith merely on the basis of his being prosecuted on more than one occasion in the absence of other indicia of bad faith. *Suggs v. Brannon*, 804 F.2d 274 (4th Cir. 1986); *United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984).

While it is certainly true that the statutory scheme adopted in New York does not prohibit school districts from filing more than one set of charges against a single teacher over the course of time, the mere filing of disciplinary charges on multiple occasions arising out of different instances of improper conduct should not be seen as evidencing arbitrary and discriminatory enforcement. *See*, Point II, below.

In this case, it should be pointed out that both prior 3020-a disciplinary charges brought by the District were substantiated by determinations of guilt by the 3020-a hearing panels. Indeed, the Commissioner of Education

recently upheld the 3020-a hearing panel's determination of guilt on the second set of charges and further increased the penalty imposed by the panel of a four month suspension without pay to a one year suspension without pay.

This Court has found in the criminal context that a mere allegation that a state prosecutor had become "personally involved" in a criminal defendant's case is insufficient to demonstrate bad faith, *Kugler*, 421 U.S. at 126, n. 6, and *amicus* respectfully submits that a "past history of personal conflict," *Cullen*, 18 F.3d at 104, between an employing school district and a tenured teacher is likewise insufficient by itself to demonstrate bad faith.

Indeed, the effect of the decision of the Court below would be that the simple filing of multiple disciplinary charges against a tenured teacher by a school district would be construed as an arbitrary and discriminatory manner of pursuing employment discipline by the district. Such a holding will effectively preclude school districts from carrying out their responsibilities to discipline teachers and involve federal courts in a function which this Court has previously held extreme deference should be afforded them.

The court below accepted the assertions of the respondent that the enforcement of New York Education Law §2031-a, an anti-electioneering statute, violated his constitutionally protected free speech rights.

Amicus respectfully asserts that federal intervention was not warranted in the present case because the respondent's free speech claims were specious. As set forth in the Statement of Facts, the respondent was never asked to cease and desist from engaging in his federally

protected free speech rights. Rather, he was simply asked to move beyond the 100 foot anti-electioneering zone to engage in his activities. As such, the restriction placed on his speech was, at most, a permissible time, place and manner restriction which did not violate his constitutional rights.

Even if the respondent's first amendment rights had somehow been implicated by the actions of the District, he failed to demonstrate that the New York State statutory scheme for disciplining tenured teachers is incapable of fully and fairly adjudicating such constitutional claims or that the process itself is constitutionally suspect.

Amicus respectfully submits that a plain reading of the contested anti-electioneering statute demonstrates that the primary and paramount purpose of the statute is to further the state's compelling interest in ensuring the integrity of the electoral process in school district elections. Based upon the very clear public policy upon which this statute is based, its enforcement cannot be seen as unconstitutionally infringing upon the free speech rights of any individual since individuals may indeed exercise their free speech rights in places outside of the anti-electioneering zone.

Indeed, this Court in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846 (1992), recently recognized as much when it upheld the constitutionality of an almost identical anti-electioneering provision from the State of Tennessee.

In *Burson*, the State of Tennessee had adopted a provision of law, similar to New York Education Law §2031-a, which prohibited electioneering activities within one hundred feet of a building being used as a polling place.

A candidate for public office challenged the Tennessee Law asserting that it violated her right to free speech under the First Amendment to the United States Constitution. In rejecting this challenge, this Court found that the state had a compelling interest in preserving the integrity of the voting process by taking measures to prevent voter intimidation and election fraud.

In upholding the Tennessee statute, this Court specifically took notice of the first anti-electioneering law in New York State, which was a precursor to Education Law §2031-a(2). This Court specifically referred to a historical commentary describing the purpose of the anti-electioneering law which stated that:

> In earlier times [New York's] polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.' This also has come to an end, and until night-fall, when the jubilation begins, [New York's] election days are now as peaceful as our Sabbaths.
>
> The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls.

Burson, 112 S.Ct. at 1854.

The public purpose served by the enactment and enforcement of Education Law §2031-a is to preserve the integrity of the electoral process. The placement of markers delineating the one hundred foot anti-electioneering zone required by §2031-a(1) is only a **means** of providing the public with notice of the overall prohibition which is the primary purpose of the law. As the Commissioner of Education has stated in construing

§2031-a, "every effort should be made . . . to ensure that [electioneering] does not occur." *Appeal of Chaplin*, 29 Educ. Dep't Rep. 388, 390 (1990).

Amicus respectfully submits that a plain reading of §2031-a in its entirety demonstrates that the placement of the markers is not a condition precedent to the general prohibition against electioneering because in adopting §2031-a the Legislature set forth both requirements separate from each other.

As a result of the respondent's clear knowledge that he was within the anti-electioneering zone and the fact that the posting of distance markers is not a condition precedent to the enforcement of the statute, the court below erred in determining that respondent's free speech rights were violated.

II. Public policy considerations compel federal courts to afford great deference to states in administering disciplinary proceedings against tenured teachers.

Well-established precedents from both state and federal courts in the nation have established that local autonomy in the management of school district affairs is essential to the operation of public schools. In this regard, this Court has stated, "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . " *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). *See also Brown v. Board of Educ.*, 347 U.S. 205, 213 (1972); *Hazelwood School Dist. v. Kuhlmeier*, 484

U.S. 260, 267 (1988). Thus, courts have found that "[e]ssential to the performance of this critically important function, moreover, is a professional and competent body of teachers capable of meeting high standards of conduct." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1017 (3rd Cir. 1981).

New York State, like a number of states in the nation, has established a comprehensive statutory scheme which provides that a teacher who fails to live up to the required standards may be disciplined or even discharged. *See*, Point I above. Clearly this is not a state statutory scheme regarding employee discipline under which federal constitutional claims raised by employees are not capable of being fairly and fully adjudicated within the context of such disciplinary actions which would warrant federal intervention into the pendency of such proceedings. *See, Barry v. Barchi*, 443 U.S. 55 (1979). However, as is set forth more fully above in Point I, the New York State statutory scheme provides tenured teachers a more than adequate opportunity to fairly and fully adjudicate their constitutional claims.

Amicus respectfully asserts that if the decision of the Court below is permitted to stand, school districts within the jurisdiction of the Second Circuit, and other jurisdictions which adopt the same analysis, will be placed in the position of being precluded from fulfilling their commitment to provide students with a teaching staff which is competent, effective and cohesive. The essential effect of the decision below is that any tenured teacher who faces disciplinary charges arising out of alleged acts of misconduct would simply need to raise constitutional objections as a defense in order to have a federal court enjoin the

proceeding and preclude the employing school district from meeting its statutory obligation to assure an effective teaching staff.

Furthermore, as set forth above, the bringing of multiple charges on the part of employing school districts against tenured teachers should not be construed as evidencing bad faith but rather, should be construed as a demonstration of the fact that such districts may be attempting to properly maintain a teaching staff which is subordinate to authority and managed properly. The expansion of the bad faith exception to the *Younger* abstention doctrine by the court below is inconsistent with the jurisprudential standards which this Court has established regarding the role of federal courts in ongoing state proceedings.

CONCLUSION

In light of the grave implications which the decision below has on the future ability of school districts to properly manage their teaching staffs, *amicus* respectfully urges this Court to grant *certiorari* in this case and to return the appropriate level of federal deference to the states and their school districts in pending state teacher disciplinary proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

—v.—

BRIAN CULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's brief in opposition distorts the controlling facts and attempts to obscure the issues actually presented by arguing a case that is not before the Court. The mere repetition of inapplicable First Amendment principles will not make them relevant to Respondent's knowing and deliberate violation of directives from School District and law enforcement authorities to cease electioneering at locations clearly within a statutorily prescribed campaign-free zone. "Putting the wrong questions," moreover, "is not likely to beget right answers even in law."[1]

Equally important, the brief in opposition in no way addresses the important state interests at stake here. Like the decision below, it is remarkable for its apparent indifference to the principles that animate the Abstention Doctrine articulated by this Court in *Younger v. Harris*, 401 U.S. 37 (1971) ("*Younger*"). Respondent says not a word, for example, about the New York State tenure statute, the important purposes that it is intended to serve or the protections that it embodies for tenured teachers.[2] *See* Petition for a Writ of Certiorari ("Petition") at 2-3 and 29-30; *see also* Brief *Amicus Curiae* of New York State School Boards Association, Inc. in Support of Petition for Writ of Certiorari. Nor does he even purport to address the potential consequences of the decision below in terms of local autonomy in the management of school district affairs and the ability of school districts to carry out their critically important function through a competent body of teachers able and willing to meet high standards of conduct.

Respondent's rhetoric and the district court's "[p]resum[ed]" findings (13a) notwithstanding,[3] the decision of the panel majority below is simply irreconcilable with *Younger* and its progeny. If it is allowed to stand without review, resort to the federal courts by teachers (indeed, by public employees generally) seeking to avoid disciplinary proceedings will be limited only by the creativity of

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1 *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring).

2 N.Y. Educ. Law § 3020-a (McKinney 1981) ("Section 3020-a").

3 The pages of the Appendices to the Petition are referred to as "__a."

counsel and will surely threaten to swallow the rule of *Younger*, with all that entails for the compelling considerations on which the Abstention Doctrine is based.

Similarly, Respondent dismisses the implications of the decision below for the election laws of dozens of states (*see* Petition at 20-21) by stating that he "never challenged the facial validity of any election law that lacks a requirement to post markers." (Resp. Br. at 14) That assertion misses the point. Respondent contends that a campaign-free zone in the vicinity of a polling place is constitutionally impermissible in the absence of "objective," "uniform" and "continuous" notice to the public (Resp. Br. at 13-20) in the form of distance markers or "a designated monitor throughout the day" (Resp. Br. at 15). It is precisely that contention, adopted by the panel majority below, that calls into question the constitutionality of election laws in as many as 26 states—which by their terms require neither distance markers nor a "designated monitor."

The Controlling Facts Corrected

Given Respondent's treatment of the record, the uncontroverted facts underlying this case bear emphasis.

- o The disciplinary penalties previously imposed on Respondent for violation of established policy and insubordination were not imposed on him by the School District.
  - — They were imposed by unanimous impartial state administrative panels convened pursuant to Section 3020-a and, in the latter case, by the New York State Commissioner of Education as well. (Petition at 4-5)
- o The School District made no effort whatsoever to prevent Respondent from electioneering or from distributing the flier that protested the election.
  - — The School District merely directed Respondent to carry out his activities outside the 100-foot campaign-free zone mandated by statute. (Petition at 6-9)
  - — As the Section 3020-a panel stated, "the directives of the District and Board officials were not intended to, and did not in fact, prevent Respondent from expressing his opinion." (48a)
- o The School District did not bring charges against Respondent for electioneering.

- The charges were for "misconduct and/or conduct unbecoming a teacher and/or insubordination" consisting of three instances of electioneering at locations that Respondent knew to be within 100 feet of the polling place, *after* he received notice not only from School District authorities, but also from the police that such electioneering was unlawful. (Petition at 9)

o There is absolutely no evidence that the School District "knowingly" (Resp. Br. at 21) failed to post distance markers on the day of the election.

- Indeed, it was stipulated below that although the Handbook for School Board Members consulted by the Superintendent before the election contained the prohibition on electioneering within 100 feet of the polling place, it was "silent concerning the placement of distance markers." (33a)

o The School District's enforcement of the Section 2031-a[4] prohibition was *not* "selective" or "subjective" (Resp. Br. at 3); nor did the School District exercise any "discretion" (*id.*) in enforcing it.

- Section 2031-a prohibits only electioneering "in a public manner." (53a-54a)
- And, there is no evidence that anyone other than Respondent violated the electioneering prohibition or that the School District failed to respond to any report of such a violation. (Petition at 27; 17a)[5]

Finally, when the courts below intervened, the disciplinary charges against Respondent were before an impartial state panel convened pursuant to Section 3020-a, which has been described as

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[4] N.Y. Educ. Law § 2031-a (McKinney 1988) ("Section 2031-a").

[5] Among the more egregious of Respondent's misleading assertions is the statement—repeated in various forms throughout the brief in opposition—that the polling place opened "early that morning" (on May 6) and was not monitored until Respondent began his illegal electioneering at 3:30 p.m., "a span of some nine hours or so." (Resp. Br. at 11) That assertion is not only without support in the record but also flatly untrue. In fact, the polling place did not open until 2:00 p.m., shortly before Respondent began to electioneer.

a "bulwark[] of [the] tenure system" that "protects tenured teachers from arbitrary suspension or removal." *Holt v. Board of Educ.*, 422 N.E.2d 499, 502 (N.Y. 1981). Determinations by such panels are subject to review by the Commissioner of Education and by the New York State courts. (Petition at 3 and n.3)

It is in this context that the issues raised by the Petition should be considered.

The Abstention Issue Restated

1. The threshold issue here is whether the courts below properly intervened in the pending state proceeding to decide the federal constitutional question raised by Respondent rather than abstaining and leaving that question for the New York State courts in the first instance (assuming that the question remained in the case after decision of any state issues presented). Under decades of settled authority, the answer is that the courts below plainly erred.

The exceptions to the Abstention Doctrine articulated in *Younger* are "extremely limited." *Younger*, 401 U.S. at 56 (Stewart, J., concurring); *see also Perez v. Ledesma*, 401 U.S. 82, 85 (1971) ("[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction . . . is federal . . . relief against pending state prosecutions appropriate"); and cases cited at pp. 22-24 of the Petition. Respondent concedes, for example, that, "[i]n the context of the *Younger* doctrine, 'bad faith' generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction." (Resp. Br. at 21)

Here, in contrast, there is no basis in the record or in law for any conclusion that the disciplinary charges against Respondent were brought without a reasonable expectation that they would be upheld. To the contrary,

- There was (and is) no reported decision holding, or even suggesting, that Section 2031-a may not be enforced in the absence of distance markers;
- The Section 3020-a panel convened to hear the charges against Respondent concluded that "the placement of distance markers . . . was not a condition precedent to application of the electioneering prohibition" (48a); and
- Judge Amalya L. Kearse agreed. (17a)

Nor can the district court's "findings" with respect to bad faith be justified on any other basis.[6] Its "apparent conclusion" (13a) that the charges were in retaliation for the exercise of Respondent's right to protest the school board elections is based solely on the erroneous view that the School District could not have had a reasonable expectation that the charges would be found valid.[7] As to the "specific finding . . . of 'animus'" relied on by Respondent (Resp. Br. at 22), it was based on the "charges and hearings and imposition of fines" that preceded the Section 3020-a proceeding enjoined by the courts below. (13a) As demonstrated in the Petition (at 25-26), that rationale for the conclusion of bad faith is a virtual parody of settled law. Multiple prosecutions brought without hope of success may justify a federal court's intervention in state proceedings. *See* Petition at 23-24 n.30 and 25-26. It was plain error, however, for the courts below to rely on *valid* disciplinary charges as evidence of "animus" or "bad faith" by the School District.

2. Respondent cites no authority to the contrary. Nor can he contend that the circumstances here even remotely resemble those presented in any other case in which there has been a finding of "bad faith" for purposes of the *Younger* doctrine. Indeed, the abstention decisions relied on by Respondent well illustrate the error

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[6] Contrary to Respondent's contention (Resp. Br. at 23), *de novo* review of the decision below on the abstention issue is appropriate. In similar circumstances, this Court has engaged in an independent examination of the facts alleged and evidence proffered by the party seeking an exception to the *Younger* doctrine. *See, e.g., Moore v. Sims*, 442 U.S. 415, 432-35 (1979) (conducting independent review of record to determine applicability of exception to *Younger*); *Hicks v. Miranda*, 422 U.S. 332, 350-51 (1974) (reviewing *de novo* the district court's findings with respect to bad faith); *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (conducting plenary review of record with regard to bad faith); *see also Cameron v. Johnson*, 390 U.S. 611, 619-20 (1967); and *Dombrowski v. Pfister*, 380 U.S. 479, 485-87 (1965).

[7] According to the district court, the "disciplinary charges were brought in bad faith . . . *since [Respondent] could not be found to have violated the law because there were no markers there*"; and the "disciplinary charges would not have been brought except for the content of the pamphlet, *since it's clear without a posting there was no violation.*" (26a; emphasis added)

of the panel majority decision below. *See, e.g., Lewellen v. Raff*, 843 F.2d 1103 (8th Cir.) (approving a temporary injunction based *inter alia* on allegations of "pervasive racism and discriminatory treatment of blacks" in court system and direct evidence of retaliatory motive), *reh'g denied*, 851 F.2d 1108 (8th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *Wichert v. Walter*, 606 F. Supp. 1516, 1521-22 (D.N.J. 1985) (declining to abstain where charges were brought "only for the purpose of harassment and retaliation, *with no hope of eventual success*") (emphasis added).[8]

3. It is not true that "[r]egardless of any state court interpretation of Section 2031-a, the federal constitutional question at bar remains." (Resp. Br. at 21-22) If a state court were to determine, as a matter of statutory construction, that the posting of distance markers is a precondition to enforcement of Section 2031-a—a question on which the New York State courts have not yet opined—then the federal constitutional question raised by Respondent would be moot. Alternatively, the Section 3020-a panel, the Commissioner of Education or a New York State court could determine that, in the circumstances presented, Respondent's conduct did not constitute "misconduct and/or conduct unbecoming a teacher and/or insubordination" (69a-71a) within the meaning of the Education Law. By virtue of the intervention of the courts below, however, both the federal and state courts were deprived of the "opportunity

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[8] Respondent also relies on *Lewellen v. Raff* for the proposition that a prosecution in retaliation for the exercise of constitutional rights "'will justify an injunction regardless of whether valid convictions conceivably could be obtained.'" (Resp. Br. at 21) As noted in the Petition, however, in a later decision in *Lewellen*, the Eight Circuit pointed out that the district court had found a substantial likelihood that the plaintiff "would establish that the prosecutor 'had no reasonable expectation of getting a conviction.'" 851 F.2d at 1110. In that later decision, the Eighth Circuit also cited with approval *Smith v. Hightower*, 693 F.2d 359, 369 (5th Cir. 1982), which specifically held "that it is erroneous for a district court to refuse to consider evidence as to whether the prosecutors entertained a reasonable expectation of obtaining a conviction." 851 F.2d at 1109. *Smith v. Hightower* was decided after the Fifth Circuit decisions relied on by Respondent. In *Wilson v. Thompson*, 638 F.2d 799, 801 (5th Cir. 1981), moreover, the Fifth Circuit ultimately concluded after remand to the district court that bad faith "played no role" in the decision to prosecute.

for narrowing constructions [of state law] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979).

The So-Called "Due Process" and "Equal Protection" Concerns

1. Respondent's repetition of the phrases "narrowly tailored" and "least restrictive means" (Resp. Br. at 13-15)—albeit without citation to any relevant authority—ignores that this Court has already upheld as constitutionally valid a prohibition on electioneering within 100 feet of a polling place. *Burson v. Freeman*, 112 S. Ct. 1846 (1992). The School District's use of oral notice to communicate the restriction set forth in Section 2031-a made it no less "narrowly tailored" and no more "restrictive" than the electioneering prohibition approved in *Burson*.

In any event, the short answer to Respondent's "due process" argument is that there was notice here and that it was objective. Respondent concedes that he himself had adequate notice of the restriction on electioneering. (Resp. Br. at 9) There is no question, moreover, as to any subjectivity in the School District's enforcement of Section 2031-a. "During each incident forming the basis of the charges, [Respondent] was situated within 100 feet of the front doors of the High School." (39a)

Respondent's "equal protection" argument is similarly flawed. Illustrative is his assertion that

> [i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by selective enforcement of an extremely broad prohibitory statute.

(Resp. Br. at 19, quoting *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965)) That is a statement with which it is difficult to disagree. It is also a statement, however, that has no application here.

On the record before this Court, there has been no determination whatsoever by the School District as to what expressions of view will or will not be permitted; nor has there been any selective enforcement. There may or may not have been "opportunity" for abuse. (Resp. Br. at 20) Indeed, there would be "opportunity" for

abuse even if distance markers were posted and even if "someone continuously monitor[ed] the area." (Resp. Br. at 20) Clearly, however, there is no evidence in this record of selective enforcement or any other abuse.

2. As pointed out in the Petition, the contention that there is a First Amendment right to electioneer at precisely 100 feet from a polling place was implicitly rejected by this Court in *Burson v. Freeman* and expressly rejected by the Fifth Circuit in *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1396 (1994). Accordingly, Respondent now says that he has "never made the frivolous argument that [requiring him to electioneer at] any distance greater than 100 feet [from the polling place] would be violative of his right to free political speech." (Resp. Br. at 16-17)

Instead, unable to argue that his own First Amendment rights were violated, Respondent asserts the rights of unidentified others. Thus, he contends that "*members of the public* are entitled to know where their speech is prohibited and where it is not" (Resp. Br. at 17; emphasis added); and that the School District's method of enforcement "risked causing *citizens* to 'steer far wider of the unlawful zone' than necessary thereby inhibiting the lawful exercise of the fundamental First Amendment right to express political speech" (Resp. Br. at 18; emphasis added).[9]

These assertions might be relevant if made in the context of a challenge to the facial validity of Section 2031-a or if made by persons charged with violating the statute due to a lack of notice. But here, Respondent "has never argued that he personally did not receive notice." (Resp. Br. at 9) As noted in the Petition, moreover, whatever the scope and complexity of the doctrine that governs facial challenges to state laws (*e.g.*, *Lakewood v. Plain*

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[9] Respondent's invocation of the rights of "members of the public" is particularly inappropriate given that the state proceeding at issue is a disciplinary one brought against him in his capacity as a public employee based upon standards set forth in the Education Law and in the Teacher Handbook for the District. (Petition at 9 n.16) *See, e.g., Waters v. Churchill*, 114 S. Ct. 1878, 1886 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign. . . . [E]ven many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.").

Dealer Publishing Co., 486 U.S. 750 (1988)), it is clear that this case does not involve a facial challenge to Section 2031-a of the Education Law.[10] Thus, Respondent's hypothetical lack of notice argument should be rejected, for his conduct was squarely and admittedly within the statutory prohibition and the disciplinary charges were based solely on conduct engaged in after he admittedly had notice of that prohibition. *See Parker v. Levy*, 417 U.S. 733, 756 (1974) and other cases cited at pp. 18-19 of Petition.

3. It is sophistry for Respondent to contend that the School District's enforcement of the Section 2031-a prohibition "did nothing to advance the compelling state interest in maintaining the integrity of the electoral process." (Resp. Br. at 8) That enforcement was designed to prevent only such intrusions on the integrity of the electoral process as were prohibited by statute and, so far as the record disclosed, it was aimed at all such intrusions that occurred or were threatened.[11] To the extent that the School District's enforcement of the statute was unsuccessful in preventing such intrusions, it is because Respondent refused to abide by explicit directives to cease electioneering at prohibited locations.

4. Much of Respondent's argument is premised on the assumption that Section 2031-a was "selectively" enforced by the School District. That assumption, properly characterized by the dissent below as "purely speculative" (17a), is without support in the record. What Respondent objects to is not selective enforcement, but passive enforcement.

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[10] Virtually all the decisions relied on by Respondent (in Point II of his brief) in support of his "due process"/"equal protection" theory involve *facial* challenges to statutory restrictions on speech. The only decisions that involve "as applied" challenges are *Brown v. Louisiana*, 383 U.S. 131 (1966), and *Cox v. Louisiana*, 379 U.S. 536, which have no application whatsoever here.

[11] In light of *Burson v. Freeman*, it is not incumbent upon the School District to show that every application of Section 2031-a is necessary in order to serve the compelling state interest that underlies the statute. Indeed, in *Burson* itself, the plurality observed that, "because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." 112 S. Ct. at 1856.

Yet, Respondent does not address (or even acknowledge) this Court's holding in *Wayte v. United States*, 470 U.S. 598, 608 (1985), which validated a passive enforcement policy as constitutional unless the party alleging selective enforcement shows "both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose." Respondent has shown neither; nor has he provided any legal authority for his attempt to shift to the School District the burden of showing an absence of selective enforcement. Here, as in *Wayte v. United States*, and in *Cameron v. Johnson*, 390 U.S. 611 (1967), in the absence of evidence that the School District permitted anyone to electioneer within the prohibited zone (let alone to electioneer there after receiving notice of the statutory restriction), Respondent's legal theories based on speculation regarding "selective enforcement" should be rejected.

CONCLUSION

For the reasons stated above and in the Petition, we urge that the decision below be summarily reversed in light of *Younger v. Harris* and its progeny. In the alternative, we urge that the Petition be granted and the case set for plenary review.

Respectfully submitted,

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